(10)

No. 90-952-ATX Title: Janice G. Clark, et al., Appellants
Status: GRANTED v.
Charles "Buddy" Roemer, Governor of Louisiana, et al.

Docketed:
December 14, 1990 Court: United States District Court for the Middle District of Louisiana

See also:
90-898
90-1187

Counsel for appellant: McDuff,Robert B.

Counsel for appellee: Pugh,Robert G., Cassibry,Fred J.

Notice of appeal filed 10/26 (supp'l notice of appeal filed 11/6) (CITED).

Entry	Date	Note	Proceedings and Orders
3	Oct 29 1990	C	Application (A90-327) for injunction and stay of three-judge district court orders, submitted to Justice Scalia.
4	Oct 31 1990		Response to application (A90-327) from respondents requested by Justice Scalia, due November 1, 1990.
5	Oct 31 1990		Response to application (A90-327) filed by respondents.
6	Oct 31 1990		(A90-327) Response as amicus curiae in support of application filed by United States.
7	Nov 1 1990		Application (A90-327) referred to the Court by Justice Scalia. November 2, 1990 Conference.
8	Nov 1 1990		Response to application (A90-327) filed by District Judges for the 24th Judicial District Court.
9	Nov 1 1990		(A90-327) Reply memorandum in support of the application filed by petitioners.
10	Nov 2 1990		(A90-327) Application for an injunction and stay of orders of the United States District Court for the Middle District of Louisiana, case No. 86-435-A, presented to Justice Scalia and by him referred to the Court is granted in part. See order. Justice White dissents. Justice Blackmun concurring in part and dissenting in part.
11	Nov 2 1990		(A90-327) Motion for modification of injunction and stay issued November 2, 1990, filed by respondents Roemer, et al..
12	Nov 5 1990		(A90-327) Response to motion for modification filed by petitioners Clark, et al..
13	Nov 5 1990		(A90-327) Response to motion for modification filed by United States as amicus curiae.
14	Nov 5 1990		(A90-327) Motion for modification of order of Court entered November 2, 1990 is granted. See order for modifications.
15	Dec 14 1990	G	Statement as to jurisdiction filed.
16	Dec 14 1990		Appendix of appellant filed.
17	Dec 19 1990	G	Motion of appellants to expedite consideration of the statement as to jurisdiction filed.
18	Dec 28 1990		DISTRIBUTED. Jan. 4, 1991.
20	Jan 7 1991		REDISTRIBUTED. January 11, 1991
22	Jan 14 1991		REDISTRIBUTED. January 18, 1991
23	Jan 14 1991	X	Motion of appellees Charles "Buddy" Roemer, et al. to

No. 90-952-ATX

Entry	Date	Note	Proceedings and Orders
			dismiss or affirm filed.
24	Jan 18 1991		Motion of appellants to expedite consideration of the statement as to jurisdiction GRANTED.
25	Jan 18 1991		PROBABLE JURISDICTION NOTED.
			**********
26	Feb 27 1991		SET FOR ARGUMENT MONDAY, APRIL 22, 1991. (3RD CASE)
27	Mar 4 1991		Brief amicus curiae of United States filed.
28	Mar 4 1991		Joint appendix filed.
29	Mar 4 1991		Brief of appellants Janice G. Clark, et al. filed.
30	Mar 4 1991		Record filed.
		*	Certified copy of original record, 2 boxes, received.
31	Mar 4 1991		Brief amici curiae of American Civil Liberties Union, et al. filed.
32	Mar 15 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
33	Mar 22 1991		CIRCULATED.
34	Mar 25 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
35	Apr 4 1991	X	Brief of appellees Charles "Buddy" Roemer, et al. filed.
36	Apr 15 1991	X	Reply brief of appellants Janice G. Clark, et al. filed.
37	Apr 22 1991		ARGUED.

90-952

No.

FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the district court err in failing to enjoin elections for certain state court judgeships held pursuant to voting changes to which the United States Attorney General had objected under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c?

2. Is the failure to preclear voting changes under Section 5 automatically cured by the later preclearance of other voting changes in the same election district?

3. What relief should be ordered by this Court in a situation where the federal district court has improperly permitted elections to occur pursuant to voting changes to which the Attorney General has objected under Section 5?

PARTIES

The parties in the court below are as follows:

Plaintiffs: Janice G. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott, Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated.

Plaintiff-Intervenor: The New Orleans Chapter of the Louis A. Martinet Society.

Defendants: Charles "Buddy" Roemer, in his capacity as Governor of Louisiana; Fox McKeithen, in his capacity as Secretary of State of Louisiana; and William Guste, in his capacity as Attorney General of Louisiana.

Defendants-Intervenors: The Louisiana District Judges Association and the Orleans Parish Trial Judges Association.

The plaintiffs in the court below are appellants in this Court. The defendants and defendant-intervenors in the court below are appellees in this Court.

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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,

Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,

Appellees,

On Appeal from the United States District Court for the Middle District of Louisiana

JURISDICTIONAL STATEMENT

The appellants are black registered voters and a voting rights organization in the State of Louisiana, and they are plaintiffs in the district court below. They appeal from orders of the three-judge court of the United States District Court for the Middle District of Louisiana dated October 22, 1990 and October 31, 1990, refusing to enjoin elections for certain state court judgeships held pursuant to voting changes that are the subject of objections by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. On November 2, 1990, this Court granted in part an application for injunction pending appeal regarding those elections, stating that the injunction is "conditioned upon the timely docketing of a statement as to jurisdiction in the above-entitled appeal." *Clark v. Roemer*, 59 U.S.L.W. 3360-3361, No. A-327 (Nov. 2, 1990, as modified Nov. 5, 1990).

OPINIONS BELOW

The order and opinion of the three-judge district court dated October 31, 1990 is unpublished and is reproduced in the accompanying appendix, J.S. App. 1a. All other orders of the three-judge district court are also unpublished and are reproduced in the appendix as follows: October 24, 1990 order (J.S. App. 57a); October 22, 1990 order (J.S. App. 68a); October 2, 1990 order (J.S. App. 85a); September 28, 1990 order (J.S. App. 90a); September 27, 1988 order (J.S. App. 98a); August 26, 1988 order (J.S. App. 103a). In addition, an October 2, 1990 order of the single-judge district court is included for reference in the appendix, J.S. App. 81a.

JURISDICTION

The district court's order denying the requested injunctive relief was entered on October 22, 1990, and was modified on October 31, 1990. A notice of appeal from the October 22 order was filed on October 26, 1990. (J.S. App. 188a). A supplemental notice of appeal from the October 22 order and the October 31 modification was filed on November 6, 1990. (*Id.* at 190a). This Court has jurisdiction of this appeal from the denial of injunctive relief by a three-judge district court under 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c (repeated verbatim in the appendix, J.S. App. 193a).

STATEMENT OF THE CASE

Over the past twenty-five years, the State of Louisiana has made a number of changes in its laws regarding judicial elections, including the creation of many new elected judgeships. Some of the voting changes were submitted for Section 5 preclearance shortly after enactment while others were not. Nevertheless, the State proceeded to implement all of the changes, even those for which preclearance never was obtained. As a result, the State's judiciary now includes a combination of precleared and unprecleared judgeships, and even

within specific judicial districts some of the judgeships are precleared and others are not.

This litigation involves a challenge brought in 1986 under Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, and the Fourteenth and Fifteenth Amendments to the use of at-large voting in mostly majority white multi-member election districts for state trial and intermediate appellate court judges in Louisiana. As initially filed, the case also raised a claim regarding a few unprecleared voting changes under Section 5 of the Act. Jurisdiction of the entire case was based on 28 U.S.C. Sections 1331 and 1343 (3) and (4), and 42 U.S.C. Sections 1973, 1973c, and 1983. On July 30, 1987, an amended complaint was filed adding a challenge under Section 5 to a larger number of unprecleared changes involving the Louisiana trial courts (known as the district courts) and the intermediate appellate courts (known as the courts of appeal), and going back over a period of twenty years. The Section 5 claims were assigned to a three-judge court under 42 U.S.C. Section 1973c.[1]

After the filing of the amended complaint, the State submitted the unprecleared changes to the United States Attorney General for clearance. In letters dated September 23, 1988 (J.S. App. 108a) and May 12, 1989 (*id.* at 127a), the Attorney General objected under Section 5 to many of the changes, including the creation of some 47 judgeships elected through at-large voting with designated posts and a majority vote requirement. In the meantime, on September 27, 1988, the three-judge court enjoined the impending fall, 1988 elections for the four uncleared judgeships scheduled to be elected at that time. (*Id.* at 98a).

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[1] The present appeal involves only the Section 5 issues. Recently, the single judge district court dismissed the Section 2 claims because of the Fifth Circuit's September 28, 1990 decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding Section 2 inapplicable to the election of judges. The single judge district court here had found Section 2 liability in a number of districts, *Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988), and was about to impose a remedy when *LULAC* was decided. The district court's resulting dismissal is the subject of a petition filed by the plaintiffs in this Court seeking a writ of certiorari before judgment in the Court of Appeals. *Clark v. Roemer*, No. 90-898. As noted in that petition, one of the reasons for granting certiorari before judgment is to allow the Section 2 issue to be heard along with the Section 5 issues raised in this appeal. Pet. Cert. at 14.

Despite the Attorney General's objection letters and despite the September, 1988 injunction from the district court, the State made no attempt to seek preclearance in the United States District Court for the District of Columbia. Instead, the State proceeded with plans to hold the fall, 1990 elections for both cleared *and uncleared* judgeships. (1990 is the regular election year for all of the state's existing 178 district court judgeships and 22 of the existing 48 court of appeal judgeships, as well as several new and previously unfilled judgeships). Shortly after learning of this, the plaintiffs filed on July 23, 1990 a motion asking the three-judge district court to enjoin the elections involving uncleared voting changes.

While that motion was pending, the Attorney General on September 17, 1990 sent letters to the State withdrawing his objection to eleven judgeships in Orleans Parish, (J.S. App. 136a), but refusing to withdraw the rest of the objections, saying the State had not carried its burden of proving the absence of a racially discriminatory purpose in creating and maintaining the voting changes encompassed by those objections. (*Id.* at 142a). He also objected to four new judgeships created since the issuance of the earlier objection letters. (*Id.*).

The United States entered an appearance in the district court and filed a memorandum *amicus curiae* supporting the plaintiffs' motion for an injunction. On September 28, 1990, a hearing was held at the conclusion of which the three-judge court entered an interim order that permitted the regularly scheduled primary elections on October 6 and the runoff on November 6 to proceed for the time being, but enjoined the winning candidates for any uncleared judgeships from taking office. (J.S. App. 90a). The three-judge court later said it permitted the elections to proceed in this provisional manner because it was uncertain about the applicability of Section 5. (*Id.* at 32a). The court also asked for further briefing on the issues.

Also on September 28, the Fifth Circuit sitting en banc released its decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding that Section 2 of the Act does not apply to judicial elections. Accordingly, on October 2, 1990, the single judge hearing the Section 2 claims lifted an injunction he previously had issued against elections under the existing at-large system in eleven judicial districts where he found a Section 2 violation. In the wake of lifting

the injunction, he also ordered that elections in those districts proceed under an accelerated special election schedule, with qualification to occur October 3-5, the first primary on November 6, and the runoff on December 8. (J.S. App. 81a). Given that the Attorney General had objected to some of the judgeships in those eleven districts, the three-judge court issued a separate order on October 2 stating that the elections for those uncleared judgeships would go forward on the same special election schedule, but the winners would be enjoined from taking office. (J.S. App. 85a).

On October 9, 1990, the Attorney General sent another letter to the State saying the previously interposed Section 5 objections would not be withdrawn despite the Fifth Circuit's decision in *LULAC*. (J.S. App. 168a).

After further briefing, the three-judge court held a hearing on October 18, 1990. On October 22, the court issued an order that denied the injunctive relief requested by the applicants and permitted the elections to proceed and the winners to take office. (J.S. App. 68a). That order was followed by an October 31 opinion explaining the rationale for the October 22 order and modifying it slightly with respect to one judgeship (which is discussed in n. 2 below). (*Id.* at 1a).

In the October 22 order and the October 31 opinion, the three-judge court held there was no need for clearance of a large number of the changes to which the Attorney General objected because subsequent voting changes in the same judicial districts had been submitted and precleared. For example, said the court, the preclearance of the creation of a seventh at-large judgeship in a district would necessarily preclear the creation of at-large judgeships in the previous six. (J.S. App. 25a). Thus, even though one or more of the previous six may not have been submitted until after preclearance of the seventh, and even though the Attorney General objected once the earlier judgeships were submitted, the district court held the Attorney General's objections to be invalid. The court said:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number

of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(J.S. App. 27a - 28a).[2]

Most of the situations in which the district court applied this rule involved the creation of at-large judgeships in districts where subsequently created at-large judgeships were submitted and precleared. However, the district court also included within the sweep of its rule (1) an uncleared act creating designated divisions (or posts) within the First Circuit, which the district court said was precleared by the approval of a later act adding numbered posts to the other circuits, (*id.* at 52a, n. 74);[3] (2) an uncleared act creating at-large circuitwide judgeships in the Second and Third Circuits, which the district court said was precleared by approval of a later act adding judgeships to be elected from smaller districts within those circuits;[4] (3) the uncleared split of the 10th judicial district and the resulting creation of the 39th, about which only the underlying referendum proposing the split had been precleared;[5] and (4) the uncleared division B judgeship in the 20th district, about which the only preclearance was of a referendum

[2] The judgeships that the district court held to have been precleared under this reasoning are listed in Part I of the October 22 order (J.S. App. 70a - 71a). In addition, on October 31, the district court also held that Division B of the 20th district was precleared in this manner. (*Id.* at 53a). It should be noted here that the district court need not have listed in Part I of its October 22 order the judgeships of the 17th and 32nd judicial districts. The plaintiffs are unaware of any failure to obtain preclearance of those judgeships and never have sought any injunction against them. The district court has been informed of the plaintiffs' position on this. Other than the judgeships from the 17th and the 32nd, all of the judgeships listed in Part I of the October 22 order as well as Division B of the 20th district have been the subject of an objection by the Attorney General. (*Id.* at 121a - 126a).

[3] The Attorney General's September 23, 1988 letter specifically objected to the act creating designated divisions in the First Circuit. (J.S. App. 126a).

[4] See exhibit D-6 to the September 28, 1990 hearing as well as J.S. App. 51a - 52a. The Attorney General objected on September 23, 1988 to the circuitwide judgeships. (*Id.* at 126a).

[5] See exhibit D-1 to the September 28 hearing. The Attorney General objected to the split on September 23, 1988. (J.S. App. 122a).

proposing allocation of the uncleared division B to a proposed new district that never was created because the referendum failed.[6]

Thus, the district court's decision had the effect of invalidating a number of the Attorney General's objections and clearing several voting changes because of the approval of related or subsequent changes in the same judicial districts.

With respect to uncleared judgeships in districts where no other seats subsequently were created or precleared, the district court held that the failure to obtain clearance of those judgeships violated Section 5.[7] Despite the absence of clearance, however, the district court said elections for those same judgeships could proceed as scheduled, with the winners being permitted to take office and serve "provisionally." The district court gave the State ninety days to file a declaratory judgment action seeking clearance in the District of Columbia (or to persuade the Attorney General to reconsider and grant clearance), with the winning candidates remaining in office during the course of the litigation in the District of Columbia. If the State loses, said the district court, those judges will continue in office for 150 days "after the finality of judgment in that case." Should the State fail to file the declaratory judgment action within ninety days (or fail to obtain clearance through reconsideration by the Attorney General), the judges elected can serve for another 150 days according to the district court's order. If the State prevails in the District of Columbia, the judges may serve their full terms. (J.S. App. 74a - 77a).

On October 29, 1990, the plaintiffs filed an application for injunction pending appeal in this Court. The application was granted in part on November 2, 1990, and the Court enjoined the November 6 and December 8 elections for those seats that the district court said

[6] See exhibit D-4 to the September 28 hearing. The Attorney General on September 23, 1988 objected to this judgeship. (J.S. App. 123a).

[7] Those judgeships are listed in Part II of the district court's October 22 order (J.S. App. 72a - 73a). However, the district court mistakenly included Division D of the 34th district, which has in fact been precleared as acknowledged by this Court's November 5 modification of the November 2 injunction pending appeal. 59 U.S.L.W. at 3362. In addition, Division B of the 6th District has since been precleared by the Attorney General on November 20, 1990. (J.S. App. 184a). All of the other judgeships listed in Part II are the subject of the Attorney General's Section 5 objections. (J.S. App. 121a - 125a, 132a, 166a - 167a, 180a).

were uncleared. This Court conditioned the injunction upon the timely filing of a jurisdictional statement appealing the district court's orders. *Clark v. Roemer*, 59 U.S.L.W. at 3361-3362.

THE QUESTIONS ARE SUBSTANTIAL

Section 5 provides that any voting change in a covered jurisdiction such as the State of Louisiana may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).The questions in this case relate to the duty of a federal district court to enforce Section 5 once a State attempts to implement voting changes to which the Attorney General has interposed an objection. This Court has granted probable jurisdiction in similar cases and reversed district courts that have failed adequately to enforce Section 5. *See, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Blanding v. Dubose*, 454 U.S. 393 (1982); *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975). The Court should do the same here.[8]

This portion of the jurisdictional statement first will discuss the district court's failure to enjoin elections for those judgeships about which it conceded Section 5 clearance is necessary and has not been obtained. Second, it will discuss the district court's ruling that preclearance of subsequent voting changes automatically preclears prior changes in the same district. Third, it will describe the relief the appellants request from this Court.

[8] This Court has held that the creation of new elected judgeships is a voting change that must be precleared under Section 5. *Brooks v. Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 59 U.S.L.W. 3293, No. 90-332 (Oct. 15, 1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986).

I. THE DISTRICT COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD UNDER UNPRECLEARED VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED UNDER SECTION 5.

Section 5 is part of the Congressional effort to stop what this Court called the "insidious and pervasive evil" of racial discrimination in voting that "had been perpetuated in certain parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

> To prevent any future circumvention of constitutional policy, Congress adopted Section 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims.

United States v. Board of Commissioners of Sheffield, 435 U.S. at 121.

By ordering elections to proceed even for judgeships it concedes should have been precleared and were not, the district court shifted the advantages of time and inertia back to the State of Louisiana and placed the burden of delay on the voters whom Section 5 was intended to protect. It permitted the State to implement voting changes found to be racially discriminatory by the Attorney General.[9] The fact that this Court enjoined elections pending appeal is an indication that the district court erred in failing itself to enjoin the elections.

This Court's injunction follows a number of prior injunctions issued in other cases by the Court and its individual Justices preventing elections from being held pursuant to unprecleared voting changes. *See, e.g., Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers); *Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). This is in accord with the clear statements of the Court saying that uncleared changes are unenforceable. "No new voting practice or procedure

[9] Neither the district court nor this Court on appellate review has the authority to second-guess the Attorney General's substantive determination. *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645-646.

may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645. Uncleared changes "are not now and will not be effective as laws until and unless cleared pursuant to Section 5." *Connor v. Waller*, 421 U.S. at 656. "[T]he change in election procedure is subject to Section 5, and the . . . *courts may not further implement that change* until the parties comply with Section 5." *Hathorn v. Lovorn*, 457 U.S. at 270 (emphasis added).

The district court has ignored those precedents and has said the State should be allowed to enforce the changes to which the Attorney General has objected for as long as it takes to litigate to conclusion a declaratory judgment action in the District of Columbia. In effect, the district court has changed Section 5 from a statute that prohibits implementation of uncleared voting changes to a statute that permits implementation as long as litigation proceeds in the District of Columbia. No decision of this Court has ever held that uncleared elections — much less elections to which the Attorney General already has objected — may go forward simply because a declaratory judgment action might be filed and might eventually be successful. To the contrary, injunctions have issued against elections even where the submission was pending before the Attorney General and the possibility existed that preclearance would be granted within less than two months. *Lucas v. Townsend*, 486 U.S. at 1303.

Here, the Attorney General has objected, and reconfirmed his objections upon reconsideration. The only possibility of clearance is in the District of Columbia, and that litigation will take quite some time. The purpose of Section 5 would be defeated if the plaintiffs were forced to wait months or years for enforcement of the protections conferred by the Voting Rights Act.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PRECLEARANCE OF VOTING CHANGES AUTOMATICALLY PRECLEARS PRIOR VOTING CHANGES IN THE SAME JUDICIAL DISTRICT.

The district court held that a number of voting changes to which the Attorney General objected were retroactively cleared because of

the preclearance of subsequent voting changes in the same judicial districts. According to the district court:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(J.S. App. 27a - 28a).

The district court's formulation flies directly in the face of this Court's decision in *McCain v. Lybrand*. In *McCain*, this Court unanimously held that the failure to preclear a voting change was *not* cured by subsequent preclearance of a second change even though the second change specifically reenacted the first. Indeed, the second change in *McCain* was very similar to the subsequent changes in the present case in that its function was to increase from three to five the number of seats and the number of residence districts within an existing at-large election system. 465 U.S. at 240. As Justice Stevens' opinion for six members of the Court said, "submission of a particular change does not encompass all prior changes — precleared or not — that have been made since the Act's effective date in 1964." *Id.* at 255, n.26. The opinion added:

> When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Section 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Section 5 preclearance.

Id. at 256. Thus, *McCain* directly refutes the district court's holding here that a preclearance by the Attorney General "not only approves the amended portion [of a statute] but necessarily approves the older, reenacted part, which forms part of the new act." (J.S. App. 27a).

The district court tried to distinguish *McCain* by pointing out that, in the present case, the subsequent acts actually precleared by the

Attorney General specified that the number of judges in a given district was being changed from one number to another (for instance, from six to seven). (J.S. App. 26a, n. 38). Of course, that in no way distinguishes *McCain*, in which the subsequent legislation actually precleared by the Attorney General clearly described the change from three to five council members. 465 U.S. at 240. The district court in the present case failed to grasp the crucial point that when an act changes the number of judges from six to seven, or the number of council members from three to five as in *McCain*, the Attorney General is called upon only to examine the evidence of discriminatory intent and impact surrounding that specific change. The Attorney General is not called upon to examine the earlier changes, such as those from from one judgeship to two, two to three, three to four, four to five, or five to six.

As this Court said in *McCain*, "the preclearance procedures mandated by Section 5 of the Voting Rights Act focus entirely on *changes* in election practices" that are submitted to the Attorney General. 465 U.S. at 251 (emphasis in original). The submission of subsequent voting changes cannot be deemed a submission of prior uncleared changes, according to *McCain*, if the submitting authority fails to point out that the prior changes also are uncleared and are being submitted. *Id.* at 256-257. Here, the State of Louisiana never informed the Attorney General of the prior uncleared changes.

This Court in *McCain* also said deference should be given to the Justice Department when it determines that its preclearance of later legislation did not preclear earlier legislation. *Id.* at 255-256. Here the Justice Department's Section 5 objections and its *amicus curiae* position in this litigation demonstrate that the Attorney General did not and does not intend for the preclearances of later legislation creating judgeships in Louisiana to have encompassed earlier voting changes in the same judicial districts. Nevertheless, the district court here substituted its judgment for that of the Attorney General in holding that the later preclearances incorporated the earlier changes.

The district court's decision also conflicts with this Court's affirmance of *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). In *Haith*, a 1967 North Carolina act (Chapter 997) had added one judgeship to each of

four judicial districts and had not been precleared. 618 F.Supp. at 412. The State defendants there claimed those same judgeships had also been included in later legislative enactments that were in fact precleared. *Id.* The district court in *Haith*, citing *McCain v. Lybrand*, said the later preclearance made no difference and enjoined elections for the judgeships in question. *Id.* at 413-414. The issue of the subsequent preclearance was raised by the State defendants in their jurisdictional statement in that case (no. 85-1066, J.S. at 20-21), yet this Court affirmed the lower court without opinion. 477 U.S. 901 (1986).

If the reasoning of the district court in the present case were allowed to stand, potentially discriminatory voting changes would go unreviewed and uncorrected, and the Congressional purpose behind Section 5 would be thwarted. Take, for example, the district court's statement that the preclearance of the creation of a seventh judgeship in a judicial district would necessarily approve the previous six. (J.S. App. 25a). A covered jurisdiction may decide to expand the number of judges elected at-large in a majority white district from one to six rather than divide that district into two smaller judicial election districts, one majority black and one majority white, and may do so with the stated discriminatory purpose of preventing the election of black judges. If the changes from one to six are implemented and not submitted, the Attorney General will have no way of reviewing the evidence of discrimination. If years later a seventh judgeship is added without discriminatory purpose and is submitted, the Attorney General will be confronted only with the change from six to seven. There will be no indication to the Attorney General that the evidence of discrimination surrounding the prior changes should be examined. Yet, under the district court's rule, the preclearance of the nondiscriminatory change from six to seven automatically would preclear the prior discriminatory changes. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither submitted nor in fact evaluated by him." *United States v. Board of Commissioners of Sheffield*, 435 U.S. at 136.

Indeed, in this case, the district court's rule automatically cleared prior changes that had little relationship to the subsequent changes actually considered and precleared by the Attorney General. For

instance, the district court held that preclearance of an act creating new Court of Appeal judgeships from smaller districts within circuits automatically precleared prior at-large circuitwide judgeships.[10] In that situation, the Attorney General never had the opportunity to evaluate the change caused by the earlier creation of judgeships elected at-large from the entire circuit. In the same vein, the district court held that the otherwise uncleared enactment of designated divisions (or posts) for the First Circuit was automatically cleared by the later approval of designated divisions in other circuits.[11] However, the Attorney General never had the opportunity to evaluate the impact of designated posts as applied to the specific situation in the First Circuit. In addition, the district court said certain changes were precleared when the only preclearance involved the Attorney General's approval of the holding of referendum elections proposing the changes.[12] This is in conflict with *United States v. Board of Commissioners of Sheffield*, 435 U.S. at 137, in which this Court said preclearance of a referendum election does not necessarily constitute approval of the underlying change proposed in the referendum.

The district court's rule would have broad and unsettling ramifications. It could well encourage jurisdictions not to submit discriminatory election changes for preclearance, comfortable in the knowledge that the measures later could be silently precleared through the submission of subsequent and more innocuous changes.

The district court's rule also would seriously hamper the Attorney General's discharge of his Section 5 responsibilities. With each submission of a voting change, the Attorney General would be required to go back and determine whether all prior changes in that voting district — no matter how many — had been submitted for preclearance. If some had not been precleared, examination of those changes would be necessary even though the covered jurisdiction had not submitted the prior changes. That would be too great a burden for the Attorney General, who already must review thousands of voting changes each year. Section 5 places upon the covered jurisdictions the responsibility of submitting to the Attorney General voting changes, and informing the Attorney General of the nature of those changes. *McCain v. Lybrand*, 465 U.S. at 249. The district court's decision reverses that principle, and is inconsistent with the structure and the efficient enforcement of the Act.

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[10] See n. 4 above and the accompanying text.

[11] See n. 3 above and the accompanying text.

[12] See notes 5-6 above and the accompanying text.

For all of these reasons, the district court's ruling on this point should be reversed.

III. THE ELECTIONS THAT DID OCCUR PURSUANT TO UNCLEARED CHANGES SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's errors, elections occurred that never should have occurred. Although this Court enjoined elections scheduled November 6 and December 8 for judgeships the district court held to be uncleared, candidates nevertheless were elected to some of those judgeships because they were unopposed or won on October 6 without the need for a November 6 runoff. In addition, the district court let elections go forward for those judgeships it deemed to have been cleared because of the preclearance of subsequent voting changes.

The question now is what should be done about those elections that the district court improperly allowed to occur. This Court's most recent case on the issue is *NAACP v. Hampton County Election Commission*, in which the Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . If appellees fail to seek this approval, *or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside*.

470 U.S. at 182-183 (emphasis added). In the present case, of course, the State long ago submitted the changes to the Attorney General for approval, and the Attorney General has objected and reiterated his objections upon reconsideration. The Attorney General's approval

has not been forthcoming, and under *Hampton County*, the elections should be set aside.

Certainly, the election results should not be left in place while the State seeks a declaratory judgment in the District of Columbia. That is exactly what the district court's order originally provided when it permitted the illegal elections to occur and the winners to serve "provisionally" pending litigation in the District of Columbia. Given that the district court's order was error in that respect, the district court should not be allowed to perpetuate the error. Litigation in the District of Columbia could take years. The State had an opportunity to initiate that litigation back when the Attorney General first interposed his objections in September of 1988, two years prior to the 1990 elections. The State did not do so, and as of the writing of this jurisdictional statement (mid-December of 1990), the State still has not filed an action in the District of Columbia. The State's dilatory tactics should not be permitted to delay the enforcement of Section 5.

Accordingly, this Court should order the district court to set aside the elections and the matter should be remanded to the district court to determine what further measures are necessary in light of the rights of black voters under Section 5 and the interests of the State in the smooth functioning of its justice system. For instance, the district court can consider in the first instance whether it is possible to hold new elections for the uncleared seats under an interim court-ordered plan that cures the Section 5 deficiencies and permits the judgeships to remain functional. *See, Hathorn v. Lovorn*, 457 U.S. at 270. In the meantime, of course, the State of Louisiana remains free to pass and preclear legislation that would cause these judges to be elected in a manner that satisfies Section 5.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, probable jurisdiction should be noted and the district court's decision should be reversed.

Respectfuily submitted,

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90-952 (9)

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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APPENDIX TO JURISDICTIONAL STATEMENT

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1990

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE CLARK, ET AL CIVIL ACTION

VERSUS NUMBER 86-435-A

CHARLES "BUDDY" ROEMER, GOVERNOR
STATE OF LOUISIANA, ET AL

[Entered October 31, 1990]

Before DAVIS, Circuit Judge, PARKER and POLOZOLA, District Judges

FRANK J. POLOZOLA, District Judge:

This action was instituted by the plaintiffs under Sections 2 and 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. §§ 1973 and 1973c.[1] Plaintiffs

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[1] The plaintiffs also alleged various constitutional violations which are not before the Court at this time.

challenge the method in which the State of Louisiana elects its district court, family court, and court of appeal judges and also seek to enjoin the election of all state district court, family court, and court of appeal judges in Louisiana which have not been precleared under Section 5 of the Act, 42 U.S.C. § 1973c.[2/] A three-judge Court was convened to hear the Section 5 claim.

This matter is now before the Court to consider plaintiffs' motion to enjoin the election for any judgeship which has not been precleared by the Attorney General of the United States.

[2/] The plaintiffs' Section 2 claim was heard by Judge Parker sitting as a single judge court. Following the decision rendered by the Fifth Circuit Court of Appeals in League of United Latin American Citizens Council #4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc), the Section 2 claim was dismissed.

The defendants object to any elections being enjoined and further seek a declaration from the Court that preclearance has already been obtained for some of the positions which are now being challenged by the plaintiffs. The parties also seek modification of certain orders previously issued by the Court.

I. Background

In the State of Louisiana, the judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by the Louisiana Constitution.[3/] Judges in Louisiana are elected by a vote of the

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[3/] La. Const. art. 5, § 1. For a detailed and authoritative analysis of the judiciary article set forth in the 1974 Louisiana Constitution, see Hargrave, The Judiciary Article of the Louisiana Constitution of 1974, 37 La. L. Rev. 765 (1977).

citizens.[4] Both prior to and subsequent to the Voting Rights Act of 1965, the district judges were elected on an at-large basis by district, while the judges on the courts of appeal were elected by circuit, on both a division and an at large basis.[5] Indeed, many of the existing judgeships in Louisiana were created prior to the passage of the Voting Rights Act of 1965.[6] "Article V [of the 1974 Constitution] on the

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[4] La. Const. art. 5, § 22. See also the laws which existed prior to the adoption of the Louisiana Constitution of 1974: La. Const. of 1921, art. 7, § 69; La. Const. of 1913, arts. 109, 119, and 124; and La. Const. of 1898, art. 109.

[5] La. Const. art. 5, § 14 (district judges) & § 9 (courts of appeal). See also La. Const. of 1921, art. 7, § 31 (district judges); La. Const. of 1921, §§ 20, 21; La. Const. of 1913, art. 100; La. Const. of 1898, art. 100; and La. Const. of 1879, art. 97 (courts of appeal).

[6] See infra Appendix B to this opinion.

judiciary makes few basic changes in the existing court system."[7] This statement was particularly true insofar as the selection of judges was concerned. While there was some debate over whether to adopt a merit selection system to select judges,[8] the delegates to the 1973 Constitutional Convention overwhelmingly voted to retain the concept of electing district judges on a district-wide, at-large basis and electing court of appeal judges by circuit.[9]

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[7] Hargrave, supra note 3, at 766-67.

[8] 2 Project of a Constitution for the State of Louisiana, art. VI, § 43 (La. St. L. Inst. 1954).

[9] Hargrave, supra note 3, at 814-15 (emphasis supplied, footnotes omitted):

> Though the committee spent much time hearing testimony on the issue [merit selection plan], the result in favor of election

(Footnote continued on following page)

As the Louisiana Legislature

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[9] (Footnote continued from preceding page) was a foregone conclusion. The basic populist orientation of the convention tended toward a greater voice for the people and a resistance to gubernatorial or **small group power**. A convention that resisted reducing the number of state-wide elected officials and that was intent on shortening the terms of appellate judges was not likely to abolish election of judges. In any event, the political forces were such that the merit selection concept had no chance. The committee recommended election by unanimous vote.

* * *

The convention was of a similar mind. A floor amendment that did not require, but simply authorized, the legislature to adopt a merit selection plan was overwhelmingly defeated by a vote of 26-87. In fact, the election of judges was implicit in the committee proposal, the convention adopted without objection a floor amendment making the requirement explicit by stating "all judges shall be elected."

added judgeships in the various district courts, family courts, and courts of appeal, the state, on most occasions, would seek preclearance of the newly enacted act from the Attorney General of the United States. However, on some occasions, the state failed to obtain the requisite preclearance.[10] Many of the

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[10] The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act of 1965. If this were the first time a three-judge court in the Middle District of Louisiana was confronted with the problem of hearing a suit seeking to enjoin an election because of the state's failure to obtain preclearance, the Court might avoid commenting on the matter. It appears to this Court that those in charge of the election process in Louisiana should undertake a very careful and detailed inventory of all legislation which relates to the election of officials in Louisiana and determine once and for all whether preclearance has been obtained from the Attorney General if such is required under the Voting Rights Act of 1965. The people of the State of

(Footnote continued on following page)

judgeships which the state failed to preclear have been in existence for many years. In many instances the state sought and obtained preclearance of an additional position in a particular district in which preclearance had not been sought for an earlier position."[11]

It is in this background that the three-judge Court must decide whether the judicial elections in the State of Louisiana may proceed and whether those persons elected may take the oath of

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[10](Footnote continued from preceding page) Louisiana, the candidates and incumbents, and the federal courts deserve nothing less.

[11] For reasons given infra, this Court has determined that these earlier positions were expressly precleared by the Attorney General when he precleared a subsequent act increasing the number of judge positions in a particular district or circuit. See infra Part 111(B), pp. 11-15 of this opinion and Appendix A, October 22, 1990, order, Part I, at 1-3.

office. This Court acknowledges the seriousness of the task before it. The State of Louisiana must have judges to preside over the large number of civil and criminal matters which are now pending and which will be filed in the future. The State of Louisiana must also comply with the provisions of the Voting Rights Act of 1965, which has been passed by the Congress and held constitutional by the United States Supreme Court.

II. PRIOR ACTION OF THE THREE-JUDGE COURT

A number of orders have been issued by this three-judge Court. On September 28, 1990, the Court issued an order allowing elections to proceed in those judgeships which had not been precleared by the Justice Department, but enjoined the winning candidates from taking the oath of office pending further

orders of the Court.[12] On October 2, 1990, this Court issued an order involving elections for those judgeships created by Act 801 of the 1987 Louisiana Legislature and certain other judgeships. The three-judge Court allowed the elections for the Act 801 judgeships to proceed, but refused to allow any additional qualification for these judgeships. In addition, the three-judge Court allowed elections to proceed in certain unprecleared judgeships, and set the qualification period for these

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[12] Document 413 in the record. The candidates for these positions had previously qualified in July of 1990 and had begun campaigning for these positions. Absentee voting for the October 6 election had been in progress since September 24, 1990. The judgeships involved in this order were not previously enjoined by Judge Parker in the Section 2 case. These judgeships were the subject of the Justice Department's letters of objection of September 23, 1988 and May 12, 1990, and its letter of September 17, 1990.

judgeships from October 3, 1990, to October 5, 1990.[13] The winners of these elections were enjoined from taking office.[14]

On October 5, 1990, the Court issued an oral ruling which involved elections in certain court of appeal races.[15] On October 18, 1990, the Court heard oral arguments in connection with a

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[13] Although the plaintiffs objected to the length of the qualification period, the period set by the Court was in accordance with the Louisiana law. The Louisiana First Circuit Court of Appeal has approved such a period of qualification in a very similar case which allowed three days for qualification. Jones v. State, 336 So. 2d 59 (La. App. 1st Cir.), writ denied, 336 So. 2d. 515 (La. 1976). (New judgeship was created by an act passed by the Louisiana Legislature on June 30, 1976, signed by the Governor on the same date, and qualifying ordered to commence July 2, 1976 and end on July 5, 1976).

[14] See documents 418, 419, and 420 in the record.

[15] See document 429 in the record.

number of motions filed by the parties. Prior to the hearing, the Court sent to the parties a list of questions on which the Court desired to hear oral arguments.[16] On October 22, 1990, after the United States Supreme Court had summarily affirmed Brooks v. State Board of Education, the Court issued a very detailed order.[17] In its order of October 22, 1990, the three-judge Court ruled:

1. Elections for those judgeships previously precleared by the Attorney General or which did not require

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[16] See documents 434 and 449B in the record.

[17] No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), modified, (S.D. Ga. May 29 and June 25, 1990) (three-judge Court), aff'd mem., Nos. 90-272 & 90-332, 1990 W.L. 120083, 1990 W.L. 132204 (U.S. Oct. 15, 1990). See document 456 in the record. This order of October 22, 1990, is attached to this opinion as Appendix A.

preclearance under the Voting Rights Act of 1965 were to proceed as scheduled;

2. The Court determined that a number of statutes creating judicial positions in Louisiana had been precleared by the Attorney General. The Court noted that when "the Attorney General cleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in the district."[18] The Court ordered elections for these judgeships to proceed on November 6 and December 8, 1990, as previously ordered by the Court. Finally, the Court allowed those judges

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[18] Order of October 22, 1990, Part I, document 456 in the record; see infra Appendix A, at 1-2.

from these precleared districts who were elected on October 6 or who were to be elected in the November 6 or December 8, 1990, elections to take the oath of office.[19]

3. After reviewing the record, the Court found certain judgeships had not been precleared by the Attorney General as required by Section 5 of the Voting Rights Act of 1965. Because the Court had previously allowed qualification for these judgeships to proceed and campaigning for these positions had already begun, the Court reissued its order which allowed the elections for these unprecleared judgeship positions to proceed on

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[19] Id. at 3.

November 6 and December 8, 1990.[20] However, the Court's order provides that those "persons elected as judges shall serve provisionally pending the further

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[20] As will be noted infra, the Court has the right to determine what remedy is appropriate where the State has failed to obtain the requisite preclearance. This Court took into consideration the confusion an order enjoining certain elections might cause the voters since the election process had already begun with the October 6 election, based in part on a prior order issued by this Court. It must be noted that this Court's prior order was issued when this Court and the parties were considering whether Section 5 preclearance was required under the facts of this case. While the Supreme Court had held that Section 5 applied to judicial elections in Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), aff'd mem., 477 U.S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), there was some doubt as to whether preclearance was required when the only change was the addition of judicial positions in a district or circuit which had previously been precleared. However, subsequent to that order, the Supreme Court rendered its summary opinion in Brooks, supra.

orders of this Court."[21/] Finally, the Court ordered that within ninety days "the State of Louisiana shall either obtain preclearance of the said judgeships from the Attorney General of the United States or shall file a suit for declaratory judgment with the United States District Court for the District of Columbia under the provisions of 42 U.S.C. § 1973c."[22/] If preclearance is obtained from the Attorney General, or the State of Louisiana obtains a favorable ruling from its declaratory judgment suit, those judges elected may stay in office. If, however, the State of Louisiana fails to obtain approval from the Attorney General or a favorable

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21/ Order of October 22, 1990, Part III, document 456 in the record; see infra Appendix A, at 5.

22/ Id. at 5.

ruling in its declaratory judgment suit, the newly elected judges of the unprecleared judgeships may only remain in office for 150 days after the finality of the judgment in that case.[23/]

4. The Court enjoined the State of Louisiana from conducting an election or allowing any person to take the oath of office for judgeships created by Act 801 of the 1987 Louisiana Legislature. The Court also ordered that if this Act is precleared or otherwise approved, the state must reopen qualifications for these judicial positions.[24/]

23/ Id. at 6.

24/ Id. at 6. As will be noted infra, the Court in its October 22 order enjoined the election for these positions because the Court had previously refused to allow the qualification period for these judgeships to be reopened. Qualification for these judgeships had taken place over two years ago. In the exercise of its discretion in formulating

(Footnote continued on following page)

After issuing its October 22, 1990, order, the Court still had before it a motion to intervene filed by a candidate for a judgeship[25/] and plaintiffs' motion to again enjoin the elections for the unprecleared positions. On October 24, 1990,[26/] the three-judge

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[24/] (Footnote continued from preceding page) a remedy to be followed in the unprecleared judgeships, the Court found that it could not allow these elections to proceed without reopening the qualification period. See NAACP v. Hampton County Election Comm'n, 470 U.S. 167, 177, 105 S. Ct. 1128, 1135, 84 L. Ed. 2d 124 (1985). Because the election process had already begun and to avoid any further confusion to the voters in Louisiana, the Court enjoined these elections until further orders of the Court.

[25/] The motion to intervene was filed by H. Michael Aaron, who was a candidate for judge of the Family Court for the Parish of East Baton Rouge.

[26/] See document 459 in the record.

Court denied the motion to intervene.[27/] The Court also denied plaintiffs' motion to enjoin the election because the election dates had not been precleared by the Attorney General.[28/] There are now pending before this Court a motion for clarification and a motion for stay and injunction which have just been filed by

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[27/] The Court found that Aaron should not be allowed to intervene as a matter of right under Rule 24(a), St. Helena Parish School Bd. v. Hall, 287 F.2d 376 (5th Cir. 1961), cert. denied, 368 U.S. 830, 82 S. Ct. 52, 7 L. Ed. 2d 33 (1961), or permissively under Rule 24(b), Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1133 (3rd. Cir. 1982) of the Federal Rules of Civil Procedure.

[28/] The Court held that a "decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act." Connor v. Johnson, 402 U.S. 690, 691, 91 S. Ct. 1760, 1762, 29 L. Ed. 2d 296 (1976); East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 96 S. Ct. 1083, 47 L. Ed. 2d 296 (1976).

the plaintiffs and shall be considered in this opinion.

III. THE ROLE OF THE THREE-JUDGE COURT IN THIS CASE

Section 5 of the Voting Rights Act limits the jurisdiction of this three-judge Court to a determination of: "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate."[29/]

A. Does Section 5 Apply In This Case?

[29/] City of Lockhart v. United States, 460 U.S. 125, 129 n.3, 103 S. Ct. 998, 1001 n.3, 74 L. Ed. 2d 863 (1983); United States v. Board of Supervisors of Warren County, 429 U.S. 642, 645-47, 97 S. Ct. 833, 834-35, 51 L. Ed. 2d 106 (1977) (per curiam).

The defendants argue that Section 5 of the Voting Rights of 1965 does not apply to judicial elections. We recognize that this Court and the United States Supreme Court have previously held that the "one-man, one-vote" principle does not apply to judicial elections.[30/] However, in Haith v. Martin, the United States Supreme Court held that Section 5 of the Voting Rights Act of 1965 does apply to judicial elections.[31/] The issue which remained in doubt was whether the

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[30/] Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973). See also Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972); Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980).

[31/] Haith v. Martin, 618 F. Supp. 410 (E.D. N.C. 1985), aff'd mem., 477 U.S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986). See also Kirksey v. Allain, 635 F. Supp. 347 (S.D. Miss. 1986).

state had to obtain preclearance for additional judicial positions in a district or circuit which had previously been precleared by the Attorney General. In Brooks, the Supreme Court affirmed a three-judge court which had held preclearance was required in such a case.[32] Therefore, we hold that Section 5 of the Voting Rights Act of 1965 applies where additional judgeships have been added to a district or circuit which has previously been precleared by the Attorney General.

B. Have Section 5's Approval Requirements Been Satisfied?

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[32] Brooks v. State Board of Elections, No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), modified, (S.D. Ga. May 29 and June 25, 1990) (three-judge Court), aff'd mem., Nos. 90-272 & 90-332, 1990 W.L. 120083, 1990 W.L. 132204 (U.S. Oct. 15, 1990).

The State of Louisiana argues that when the Attorney General precleared subsequent additional judgeships in a particular district he thereby approved previously added, unprecleared judgeships.[33] The plaintiffs contend that each additional judgeship in a particular district must be specifically submitted to the Attorney General for approval. We find that when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the

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[33] The State of Louisiana also argues that when the Attorney General precleared the Louisiana Constitution of 1974, he approved the concept of electing judges on an at-large basis in Louisiana. The Court rejects this argument. We find that the state has failed to prove that the preclearance of constitution preclears the method of electing judges.

ultimate number of judicial positions in that district. For example, the First Judicial District Court in Caddo Parish has nine judicial positions. Four of these judgeships were in existence prior to the passage of the Voting Rights Act of 1965 and did not need preclearance.[34/] The remaining positions did require preclearance from the Attorney General. The State of Louisiana submitted and obtained approval of Divisions E, G, H, and I.[35/] For some reason Act 117 of 1973, which created Division F, was not submitted for approval when it passed,

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34/ These were Divisions A, B, C, and D.

35/ Division E was added by Act 2 of 1966 and was precleared on August 18, 1986. Division G was added by Act 46 of 1976 and precleared on August 11, 1976. Division H was added by Act 39 of 1978 and precleared on September 20, 1978. Division I was added by Act 21 of 1982 and precleared on December 2, 1982.

and the Attorney General denied preclearance on September 23, 1988. We find that when the Attorney General approved Divisions G, H, and I, he also approved Division F. We reach this conclusion because each of the Acts of the legislature which added a new division in Caddo Parish provided that the Act increased the number of judges in the district from an existing number to a new number. When the Attorney General precleared seven judicial positions in Caddo Parish at the time Division G was added, he thereby expressly approved the first six positions, which included Division F. Contrary to plaintiffs' argument, we find that there was express approval by the Attorney General for those judicial positions set forth in

Part I of our October 22, 1990, order.[36] The language of the various acts[37] submitted to the Attorney General, as well as the letters[38] submitted by the

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[36] See supra text accompanying note 18 and infra Appendix A, at 2-3.

[37] Article 3, Section 15(B) of the Louisiana Constitution of 1974 provides that: "A bill enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of law shall be adopted by general reference to it."

[38] See Defendants' exhibits 1-6 which were introduced in the record at the various hearings held by the three-judge Court. There are two documents designated as D-6. In the submission to the Attorney General, the Act submitted, and in most cases the letter of submission, clearly and expressly states that the number of judges in a particular district is being increased from one number to another. This procedure is clearly distinct and different from the facts set forth in McCain v. Lybrand, 465 U.S. 236, 104 S. Ct. 1037, 79 L. Ed. 2d 271 (1984), which is relied on by the plaintiff. It cannot be said that the submission by the State of Louisiana was ambiguous concerning the scope of the request.

State of Louisiana seeking preclearance, support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act.[39] Thus, when an act provides for a certain number of judicial positions, approval of that act must

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[39] The example which the Court used in our opinion involved Caddo Parish. The same reasoning was used for each of the parishes in which the court found preclearance by the Attorney General when he approved a subsequent act in a particular district. As noted earlier, those judicial positions which the court found were precleared by the Attorney General are set forth in the order of October 22, 1990, Part I, document 456 in the record, infra in Appendix A, at 2-3.

include all of the judicial positions necessary to reach that number.

In determining whether the preclearance sought by the State of Louisiana was proper within the meaning of Section 5 of the Voting Rights Act of 1965, the Court must determine whether the submission was in an "unambiguous and recordable manner" and whether the submission was "in fact evaluated" by the Attorney General.[40] The Court finds that the evidence presented in this case does show that the submissions were made to the Attorney General in an unambiguous manner, and he approved the various increases in the number of judges to be

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[40] Allen v. State Bd. of Elections, 393 U.S. 544, 571, 89 S. Ct. 817, 834, 22 L. Ed. 2d 1 (1969); United States v. Board of Comm'rs of Sheffield, Alabama, 435 U.S. 110, 136, 98 S. Ct. 965, 981, 55 L. Ed. 2d 148 (1978); McCain v. Lybrand, 465 U.S. 236, 249, 104 S. Ct. 1037, 1046, 79 L. Ed. 2d 271 (1984).

added to each of the districts set forth in Part I of our October 22 order.[41]

The Court also finds that preclearance was not obtained from the Attorney General as to those judicial positions listed in Part II of the Court's October 22 order. Unlike the judicial positions which we found to have been precleared by the subsequent approval of an act increasing the number of judges in a particular district, there was no subsequent approval of the positions listed in Part II.[42] Insofar

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[41] The evidence submitted by the parties indicates that the Attorney General approved the method Louisiana used for adding judges approximately 81 times. Preclearance was denied on only three dates: September 23, 1988; May 12, 1989; and September 17, 1990. These denials came after Judge Parker had rendered his decision in the Section 2 case on August 15, 1988.

[42] The Court originally concluded that Section B in the 20th Judicial

(Footnote continued on following page)

as these positions are concerned, the Court finds that acts passed by the legislature were either not submitted for preclearance, or, if submitted, preclearance was denied by the Attorney General. As to those judicial positions which have not been precleared, the Court must determine what remedy is appropriate.[43]

C. What Remedy is Appropriate for the Unprecleared Positions?

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[42] (Footnote continued from preceding page) District was not precleared. Now, in accordance with the Court's reasons, infra text pp. 24-26 of this opinion, the Court finds that this judicial position was precleared. See Defendants' exhibit D-4.

[43] This court does not have the power to order the Attorney General to preclear a statute, nor does it have the power to equitably preclear a statute no matter how long it may have been in force. McCain v. Lybrand, 465 U.S. at 249-53, 104 S. Ct. at 1046-47.

Having concluded that certain judicial positions have not been precleared as required by Section 5 of the Voting Rights Act of 1965, the Court must now determine what remedy is appropriate under the facts of this case. The Court feels it is important to review the actions the Court has taken thus far insofar as the unprecleared positions are concerned.

In its order of October 22, 1990, the Court did not enjoin the election held on October 6, or the elections to be held on November 6 and December 8, 1990. As noted in the Court's summary of the orders issued by the three-judge Court in this case,[44] qualifying for some of these judicial positions had begun before any hearing

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[44] See supra Part II, pp. 5-10 of this opinion.

was requested to enjoin these elections. Absentee voting had begun on September 24 for the October 6 elections. Because of the confusion over whether Section 5 applied where additional judges were added in districts or circuits which had previously been precleared by the Attorney General, the three-judge Court had permitted the October 6 election to proceed, and ordered elections to be set for November 6 and December 8, 1990. Much time and expense had been expended by the candidates for these elections. The election set for October 6 coincided with an election for a United States Senator and numerous other offices, as well as approval of several constitutional amendments.[45/] Furthermore,

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[45/] One of the issues on the ballot concerned whether a lottery should be allowed in Louisiana. This issue, as

(Footnote continued on following page)

November 6 is the date for general elections for United States Senators and Representatives. It was the Court's desire to have these judicial elections coincide with these other major elections to ensure high voter participation.[46/] To have enjoined the elections for some of the judge races would have only increased the voter confusion. While the Court does not intend to place the blame on any one party, the request for an

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[45/](Footnote continued from preceding page) well as the election for United States Senator, had attracted substantial voter interest. This factor was taken into consideration by the three-judge Court when it approved the dates for the election.

[46/] In NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178, 105 S. Ct. 1128, 1135, 84 L. Ed. 2d 124 (1985), the Supreme Court noted: "In addition, an election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November." (footnote omitted).

injunction of the unprecleared judicial positions came very close to the October 6 election day. Furthermore, the Fifth Circuit rendered its en banc decision in League of United Latin American Citizens Council #4434 v. Clements (LULAC) on September 25, 1990. LULAC had an important and direct effect on the Section 2 claim which was being handled by Judge Parker.[47] Judge Parker had enjoined certain judicial elections because he found Section 2 violations. After the Fifth Circuit's en banc decision, Judge Parker lifted his injunction and later dismissed the Section 2 claim. The judicial positions that were enjoined in the Section 2 claim included both precleared and unprecleared judgeships. At the time the Court

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[47] Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988).

conducted the hearing which led to its October 22 order, it was obvious that the candidates had begun campaigning and spending money in reliance on the Court's prior decisions ordering elections to be held on October 6, November 6, and December 8, 1990. Furthermore, the Supreme Court had not yet rendered its decision in Brooks at the time the Court conducted its hearing.[48]

Thus, the Court, sitting as a court of equity, had to balance the "interest of state and local authorities in managing their own affairs consistent

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[48] Brooks v. State Bd. of Educ., No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), modified, (S.D. Ga. May 29 and June 25, 1990) (three-judge Court), aff'd mem., Nos. 90-272 & 90-332, 1990 W.L. 120083, 1990 W.L. 132204 (U.S. Oct. 15, 1990). The memorandum opinion of the Supreme Court was rendered on October 15, 1990. This memorandum opinion was important insofar as the issue of whether Section 5 applied to judicial elections was concerned.

with the Constitution"[49] with the rights of the plaintiffs under the Voting Rights Act of 1965. The Court also had to consider what effect its decision would have on the voters in the pending elections. Finally, the Court had to consider the effect of its decision on the state's judicial system, both past and future. We are not unmindful of the fact that the state itself is responsible for the consequences of its failure to comply with Section 5. However, we believe the potential harm to all of the citizens of Louisiana outweighs the potential harm, if any, of allowing the elections to continue, with the winning candidates being seated on a provisional

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[49] Spallone v. United States, ___ U.S. ___, ___, 110 S. Ct. 625, 632, 107 L. Ed. 2d 644 (1990), relying on Milliken v. Bradley, 433 U.S. 267, 280-81, 97 S. Ct. 2749, 2757, 53 L. Ed. 2d 745 (1977).

basis. To remove judges from unprecleared positions or to fail to vest them with the full power and authority of their office even on a provisional basis could lead to the possible reversal of convictions in criminal cases and cast a shadow on civil judgments.

Furthermore, to completely shut down these unprecleared positions under the facts of this case would only cause additional hardships on litigants and create more problems in the criminal justice system in Louisiana.[50]

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[50] All parties to this litigation concede that the legislature added positions to the various district courts and the courts of appeal because the caseload required such. There are no allegations that the additional judges were added in a racially discriminatory manner. It is the concept of electing judges on an at-large basis that is the subject of the discrimination charge in this case.

Considering the above factors, the Court decided in its October 22 order to allow the elections for the judicial positions which had not been precleared to continue. However, the Court ordered that candidates could only "serve provisionally pending further orders of this Court."[51/] The Court also set a deadline for the State of Louisiana to either obtain preclearance of the judicial positions from the Attorney General or to file a suit for declaratory judgment with the United States District Court for the District of Columbia.[52/] Provisions were set forth in the order for the removal of judges elected to unprecleared judgeships if the state did

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[51/] Order of October 22, 1990, Part 111(1), document 456 in the record; see infra Appendix A, at 5.

[52/] Id., Part 111(2), (3), and (5), at 5-6.

not obtain relief from the Attorney General or the District Court for the District of Columbia.[53/] The Court also ordered judges elected to these unprecleared positions removed if the State of Louisiana chose to do nothing.[54/]

The action taken by the three-judge Court in this case closely parallels action taken in similar cases by the United States Supreme Court and other three-judge courts.[55/] In Perkins

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[53/] Id., Part III (5) and (6), at 6.

[54/] Id., Part III(6).

[55/] See Brooks v. State Bd. of Educ., No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), modified, (S.D. Ga. May 29 and June 25, 1990) (three-judge Court), aff'd mem., Nos. 90-272 & 90-332, 1990 W.L. 120083, 1990 W.L. 132204 (U.S. Oct. 15, 1990); NAACP v. Hampton County Election Comm'n, 470 U.S. 167, 105 S. Ct. 1128, 84 L. Ed. 2d 124 (1985); Berry v. Doles, 438 U.S. 190,

(Footnote continued on following page)

v. Matthews, the United States Supreme Court noted that "[i]n certain circumstances ... it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming.[56] The Perkins Court also noted that in determining the appropriate

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[55](Footnote continued from preceding page) 98 S. Ct. 2692, 57 L. Ed. 2d 693 (1978); United States v. County Comm'n, Hale County, Alabama, 425 F. Supp. 433 (S.D. Ala. 1977), aff'd mem., 430 U.S. 924, 97 S. Ct. 1540, 5 L. Ed. 2d 768 (1977); Georgia v. United States, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973); Scaggs v. Larsen, 396 U.S. 1206, 90 S. Ct. 5, 24 L. Ed. 2d 28 (1969); Moore v. Leflore County Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971); Wilson v. North Carolina State Bd. of Elections, 317 F. Supp. 1299 (M.D.N.C. 1970).

[56] 400 U.S. 379, 396-97, 91 S. Ct. 431, 441, 27 L. Ed. 2d 476 (1971); see also Berry v. Doles, 438 U.S. at 192, 98 S. Ct. at 2693.

remedy to be followed in cases in which the state had not obtained the requisite preclearance "other factors might be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by §5."[57] Furthermore, the Supreme Court noted:

> Since the District Court is more familiar with the nuances of the local situation than are we, and has heard the evidence in this case, we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties.[58]

We have concluded that it would be in the best interest of all concerned to allow the elections to proceed and to

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[57] 400 U.S. at 396, 91 S. Ct. at 441.

[58] Id. at 397, 91 S. Ct. at 441 (footnote omitted).

allow the newly elected judges to take office on a provisional basis while at the same time requiring the state to obtain preclearance from the Attorney General or the United States District Court for the District of Columbia. If the state obtains approval from the Attorney General, or if relief is granted by the District Court for the District of Columbia, the elections will stand. Otherwise, the court must set aside the elections. Such a procedure has been followed by the United States Supreme Court. Thus, in NAACP v. Hampton County Election Commission,[59] the Supreme Court, following Berry v. Doles[60] noted:

> As in Berry v. Doles, supra, it is appropriate in these

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[59] 470 U.S. 167, 105 S. Ct. 1128, 84 L. Ed. 2d 124 (1985).

[60] 438 U.S. 190, 98 S. Ct. 2692, 57 L. Ed. 2d 693 (1978)

> circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. If appellees fail to seek this approval, or if approval is not forthcoming, the results of the March 1983 election should be set aside. If, however, the Attorney General determines that the changes had no discriminatory purpose or effect, the District Court should determine, in the exercise of its equitable discretion, whether the results of the election may stand.[61]

A similar holding was set forth in Berry where the Court declared that "[i]f approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous elections of all members of the Board at the 1978 general

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[61] 470 U.S. at 182-83, 105 S. Ct. at 1137-38 (citation omitted).

election."[62] In United States v. County Commission, Hale County, Alabama, the United States Supreme Court approved an order very similar to that issued by this court:

> That the November 2, 1976 election be held as scheduled; and that the two persons elected as Commissioners in said election and the other two members of the Hale County Commission shall serve provisionally pending the further orders and decrees of this court, and vested with all the power, authority, and duties accorded by law.[63]

Justice Black, sitting as a Circuit Justice, refused to enjoin an election in Oden v. Brittain, stating:

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[62] 438 U.S. at 193, 98 S. Ct. at 2694.

[63] 425 F. Supp. 433, 436 (S.D. Ala. 1977), aff'd mem., 430 U.S. 924, 97 S. Ct. 1540, 51 L. Ed. 2d 768 (1977). The three-judge court also set a deadline for the state to seek approval from the Attorney General.

> Intervention by the federal courts in state elections has always been a serious business. Here the city has already incurred considerable expense in preparing for an election to be held within the next three weeks. If this election were held, applicants could later bring suit to have it set aside. I thus do not see why these plans should be stopped in midstream in a case in which the legal issues are unclear, when the election cannot result in the severe irreparable harm necessary to justify the issuance of the extraordinary remedy of an injunction by an individual Justice.[64]

Other three-judge courts have allowed incumbents to remain in office or an election to proceed contingent on the state seeking approval from the Attorney General or the District Court for the District of Columbia, including the

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[64] 396 U.S. 1210, 1211, 90 S. Ct. 4, 5, 24 L. Ed. 2d 32 (1969)

courts in Brooks[65] and Moore v. Leflore County Board of Election Commissions.[66]

Finally, in Georgia v. United States,[67] the United States Supreme Court found itself in a dilemma similar

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[65] In Brooks, the three-judge court noted: "Thus, we believe it is appropriate for us to follow the course set out in Berry and N.A.A.C.P. v. Hampton County." 1989 W.L. 180759 at 21.

[66] 351 F. Supp. 848 (N.D. Miss. 1971). In Moore, the court ruled:

> Instead, we authorize and allow the general election to proceed as scheduled for the at-large election of county supervisors subject to stated conditions. . . . We reserve for decision at that time the issue of whether, under Sheffield v. Itawamba County Board of Supervisors, supra, this court, sitting as a court in equity and in the exercise of its discretion, should order the election of new supervisors on at-large basis or by districts as redistricted in accordance with the approved plan. 351 F. Supp. at 852-53.

[67] 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973).

to the one this Court faces under the facts of this case. The Supreme Court had stayed a three-judge order which had enjoined an election. The State of Georgia then proceeded with the election. The Supreme Court refused to set aside the election conducted by the State of Georgia stating:

> For the foregoing reasons, the judgment of the District Court is affirmed. Since, however, elections were conducted under the disputed 1972 plan by reason of this Court's stay order, it would be inequitable to require new elections at this time.[68]

This Court has previously ordered the elections to proceed in this case. Acting pursuant to this Court's orders, the state printed ballots, opened qualifications, and set election dates as ordered by the Court. The candidates

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[68] 411 U.S. at 541, 93 S. Ct. at 1711.

proceeded to qualify and to campaign. When the Court issued its order of October 22, 1990, the election of October 6 had already taken place, and run-offs were scheduled for the November 6 general election. Those candidates who did not participate in the October 6 election were campaigning for the November 6 election. The Court believes that "it would be inequitable" to stop the election process being conducted under the authority of an order **issued by this Court.** This is particularly so since the Court has provided that the winning candidates will only take office provisionally. If the State of Louisiana obtains preclearance or relief in a declaratory action filed with the District Court in the District of

Columbia, "the matter will be at an end."[69] If the state fails to obtain the requisite preclearance from the Attorney General or relief from the District Court in the District of Columbia, the results of the October 6, November 6, and December 8 elections involving unprecleared judicial positions "should be set aside."[70] The Court believes such a procedure is equitable under the facts of this case and protects the rights of all of the citizens of the State of Louisiana, while at the same time enforcing the provisions of the Voting Rights Act of 1965.

After this Court rendered its October 22 order, the plaintiffs filed a

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[69] Berry, 438 U.S. at 193, 98 S. Ct. at 2694.

[70] Hampton County, 470 U.S. at 183, 105 S. Ct. at 1137-38.

"Motion For Clarification and Reconsideration of the Three-Judge Court's October 22 Order Regarding Certain Judgeships."[71] The plaintiffs also filed a "Motion to the Three-Judge Court for Stay and Injunction Pending Appeal."[72] The Court shall discuss each of these motions separately.

IV. PLAINTIFFS' MOTION FOR RECONSIDERATION AND CLARIFICATION

The plaintiffs have filed a motion seeking to have the Court reconsider its October 22 order insofar as it applies to certain judgeships set forth in Part I of the Court's order. In Part I of the order of October 22, the Court set forth those judicial positions which the Court found to have been

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71/ Document 462 in the record.

72/ Document 466 in the record.

precleared by the Attorney General. Specifically, plaintiffs ask the Court to review its decision on the following judicial positions: 10th District, Divisions A and B, and 39th District, Division A; all judgeships in the First Circuit Court of Appeal; and the at-large judgeships in the Second and Third Circuits.[73]

The Court has again reviewed the record and finds that its decision which held that the judicial positions set forth in Part I of its October 22 order have been precleared by the Attorney General is correct for the

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73/ Plaintiffs also contend that this Court precleared judgeships in the 17th and 32d judicial districts even though there were no Section 5 objections made on those two districts. Whether there is an objection filed or not, the Court's decision that these judicial positions have been precleared by the Attorney General is correct.

reasons previously cited in this opinion. We also find that the Attorney General specifically precleared the division of the 10th and 39th Judicial Districts into two separate districts when he approved judicial positions for both districts. Finally, we conclude that when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits.[74/]

The Court on its own motion does find that one judicial position which the Court initially found to be

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74/ The state's six page letter of July 29, 1981, to the Attorney General explained in detail the changes made by Act 3 of 1981. On page 4 of the letter, it is stated: "Prior law provided for alphabetical divisions (A, B, C, . . .) within each district of the First Circuit. New law provides the same for all court of appeal circuits." (emphasis in original).

unprecleared has in fact been expressly precleared by the Attorney General. This district is District 20, Division B. Exhibit D-4, which was filed in the record, clearly shows that the split of District 20 into two parishes and the creation of Division B was expressly submitted and approved by the Attorney General. Therefore, the Court hereby amends its October 22 order to delete District 20, Division B from the unprecleared list in Part II of the order. The Court orders this judicial position to be included in Part I of the October 22 order which sets forth precleared judicial positions.

Therefore, except as amended herein regarding District 20, Division B, plaintiffs' motion for clarification and reconsideration is denied.

V. PLAINTIFFS' MOTION FOR STAY AND INJUNCTION PENDING APPEAL

The final motion before the Court is plaintiffs' motion for a stay and injunction pending appeal. We deny this motion. The Court believes that, considering the facts of this case, it has issued appropriate orders in the exercise of its equitable jurisdiction in accordance with precedent and authority of the United States Supreme Court and other three-judge courts. The rights of all parties have been protected and the provisions of the Voting Rights Act of 1965 have been enforced.

Therefore, plaintiffs' motion for stay and injunction pending appeal is denied.

VI. CONCLUSION

The Court has given very careful consideration to the arguments of

all of the parties in this very difficult case. The Court believes the orders it has issued in this case are equitable under the facts of this case. At the same time, the Court must sound a very clear and direct warning to the State of Louisiana. If the State of Louisiana does not seek or otherwise obtain preclearance in accordance with the Voting Rights Act of 1965 of those judicial positions which this Court has found to be unprecleared, this Court **SHALL ENFORCE** its order requiring removal of judges from those unprecleared positions. While the Voting Rights Act of 1965 has been criticized and may be controversial, it is the law of this country until repealed by the Congress or found to be unconstitutional by the United States Supreme Court. As such, the Act shall be enforced by this Court.

This Court shall retain supervisory jurisdiction of this case for whatever further relief may be necessary or required.

Baton Rouge, Louisiana, October 31, 1990.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ET AL

VERSUS

CHARLES "BUDDY" ROEMER, ET AL

CIVIL ACTION

NO. 86-435-A

RULING BY THREE JUDGE COURT ON MOTIONS

[Entered October 24, 1990]

There are two motions pending before the court.

I. Motion to Intervene

A motion to intervene has been filed on behalf of H. Michael Aaron who declares that he is a candidate for judge of the Family Court for the Parish of East Baton Rouge at the election presently scheduled for November 6, 1990.

Mover urges that he is entitled to intervene because a cancellation of the election date would adversely affect his candidacy. Although neither the motion nor the memorandum of law filed in support of the motion specify what issue mover desires to address, the court assumes that the motion is addressed to the recently filed motion by plaintiffs to enjoin both the elections ordered by the single-judge court and the elections ordered by the three-judge court. The motion by plaintiff to enjoin the elections will be considered infra. Plaintiffs argue that the date of November 6, 1990 and December 8, 1990 must first be submitted to the Attorney General for preclearance under Section 5 of the Voting Rights Act because the dates are not those regularly scheduled by state law.

This court finds that mover has no right to intervene under Rule 24(a), Fed. R. Civ. P. See Hall v. St. Helena Parish School Board, 287 F.2d 376 (5th Cir. 1961); Brumfield v. Dodd, 425 F.Supp. 528 (E.D. La. 1976). Neither are we convinced that permissive intervention should be allowed under Rule 24(b). See Hoots v. Commonwealth of Pa., 672 F.2d 1133 (3d Cir. 1982). The interests of this mover concerning the dates of the election are adequately protected by other parties, including the Governor of Louisiana, the Attorney General of Louisiana, the Secretary of State of Louisiana, the Louisiana District Judges Association, the Orleans Parish Judges Association, as well as the district judges of the Twenty-fourth Judicial District for the Parish of Jefferson, all

of whom are very interested in the dates of the election.

The motion for leave to intervene is hereby DENIED. Mover is, however, granted permission to file a brief as amicus curiae.

II. Motion to Enjoin At-large Elections for "Unprecleared Election Schedule"

By its orders of September 28, 1990 and October 2, 1990, the court ordered that elections go forward on November 6, 1990 and, if a run-off is necessary, on December 8, 1990. Plaintiffs take the position that before elections can be held for these judgeships, the state defendants must first submit the dates of the elections to the Attorney General for preclearance under Section 5 of the Voting Rights Act of 1965. The regularly scheduled primary

election date in Louisiana was October 6, 1990 and the regularly scheduled general election is November 6, 1990.

It is the position of plaintiffs that all elections scheduled for November 6 must be enjoined without regard to whether the office up for election has been precleared by the Attorney General already or not. Plaintiffs claim that because the election dates "reflect the policy choices of the elected offices of the State of Louisiana, they are voting changes that must be precleared."

Plaintiffs' argument is not convincing. It is clearly established that, "A decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act." Connor v. Johnson, 402 U.S. 690, 691, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971).

See also East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). The dates of the election were selected and ordered by the court itself, although counsel for all parties were allowed input. These election dates were not scheduled by the state; they were ordered by the three-judge court and the single-judge court, respectively, and the defendants are simply carrying out the orders of the court.

It is well established that a three-judge district court in exercising its duties under Section 5 of the Voting Rights Act determines: "(i) whether a change [is] covered by Section 5, (ii) if the change [is] covered, whether Section 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate."

City of Lockhart v. United States, 460 U.S. 125, 129, 103 S.Ct. 98, 1001 n.3, 74 L.Ed.2d 863 (1983). The court has authority to consider equitable arguments put forth by the defendants or the plaintiffs only in the very limited context of fashioning an appropriate remedy. Section 5 contemplates injunctive relief, which is, by its nature, equitable. The Supreme Court has certainly indicated that a three-judge court has some limited discretion in fashioning a remedy by directing such courts to fashion "appropriate" remedies. See e.g., Perkins v. Matthews, 400 U.S. 379, 441, 91 S.Ct. 431, 441 (1971).

As will be set forth at length in the formal opinion which will be issued, this court has concluded that it would be inequitable to summarily turn out of office a host of Louisiana judges,

some of whom have been serving since 1968 or 1970 or 1974. The shock to the judicial system is simply not warranted, unless there are no other alternatives. As the court's order of October 22 indicates, the court has exercised its discretion by allowing the elections for non-precleared judgeships to proceed but allowing the successful candidates to take office only provisionally. That gives the state an opportunity to litigate its claim, if it desires, in the United States District Court for the District of Columbia and at the same time provides the judicial work force which the state needs. The order also provides that if the state declines to litigate or loses the case, the nonprecleared judgeships will terminate. As to the judicial offices which the court held in its order of October 22, 1990 to have

been precleared by the attorney general, it is the court's decision that these judgeships should be filled as rapidly as possible and with the least expense to the state. It is also desirable that, as nearly as may be, the established policy of the state to hold all judicial elections at the same time be observed. For all these reasons, and those to be set forth in the formal opinion, the court has exercised its discretion and has by its own authority ordered these election dates. The choice of election dates by a court must no more be precleared by the Attorney General than the court's choice of enjoining elections must be precleared by the Attorney General.

The motion to enjoin elections held pursuant to "unprecleared election schedule" is hereby DENIED both as to the

elections ordered by this three-judge court and by the single-judge court.

Baton Rouge, Louisiana, October 24, 1990.

/s/ W. Eugene Davis by JVP
W. EUGENE DAVIS
UNITED STATES CIRCUIT
JUDGE

/s/ John V. Parker
JOHN V. PARKER, CHIEF
JUDGE
MIDDLE DISTRICT OF
LOUISIANA

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT
JUDGE
MIDDLE DISTRICT OF
LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ET AL CIVIL ACTION

VERSUS NUMBER 86-435-A

CHARLES "BUDDY" ROEMER,
GOVERNOR OR LOUISIANA, ET AL

ORDER

[Entered October 22, 1990]

This matter is before the Court for a reconsideration of the prior orders issued by this Three Judge Court. Considering Brooks v. State Board of Elections, No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), modified, (S.D. Ga. May 29 & June 25, 1990) (Three-Judge Court), aff'd mem., (U.S. Oct. 15, 1990) (Nos. 90-272 & 90-332), and for more detailed reasons which shall be set

forth in an opinion to follow, we issue the following order:

I.

IT IS ORDERED, ADJUDGED AND DECREED that the election shall proceed as scheduled for judgeships individually precleared by the Attorney General or in which preclearance was not required because the judgeship predated the Voting Rights Act of 1965.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition we have determined that when the Attorney General cleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district. Therefore, we find that the

following positions in judicial districts of the State of Louisiana have been precleared in this manner by the Attorney General of the United States as required by Section 5 of the Voting Rights Act of 1965:

(1) DISTRICT COURTS

JDC	PARISH	DIVISION
1st	Caddo	F
4th	Morehouse & Ouachita	D
9th	Rapides	D E
10th	Natchitoches	A B
15th	Acadia, Lafayette & Vermillion	E F H I
16th	Iberia, & St. Martin	D
17th	Lafourche	A B C D

18th	Iberville, Point Coupee & West Baton Rouge	C
21st	Livingston, St. Helena & Tangipahoa	D
23d	Ascension, Assumption & St. James	C
24th	Jefferson	H I J K
27th	St. Landry	C
29th	St. Charles	C
32d	Terrebonne	C
39th	Red River	A

(2) COURTS OF APPEAL

CIRCUIT	DISTRICT	DIVISION
1st	1	All
1st	2	All
1st	3	All
2d	at large	at large
3d	at large	at large

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the elections for these

judgeships set for November 6, 1990 and December 8, 1990 SHALL PROCEED as scheduled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any candidate who was elected in the October 6, 1990 election in these precleared judgeships shall be allowed to take the oath of office and serve the regular term of office.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following positions in judicial districts of the State of Louisiana have not been precleared by the Attorney General of the United States as required by Section 5 of the Voting Rights Act of 1965:

(1) DISTRICT COURTS

JDC	PARISH	DIVISION
4th	Morehouse & Ouachita	F
		G

6th	East Carroll, Madison & Tensas	B
14th	Calcasieu	E
		F
		G
		H
16th	Iberia, St. Martin & St. Mary	G
20th	East Feliciana & West Feliciana	B
21st	Livingston, St. Helena & Tangipahoa	F
22d	St. Tammany & Washington	G
24th	Jefferson	P
26th	Bossier & Webster	E
34th	St. Bernard	D
40th	St. John the Baptist	C

(2) COURTS OF APPEAL

All judgeships authorized by Act 8 of 1990 including:

(a) Second Circuit Court of Appeal, District 1, Division C;

(b) Second Circuit Court of Appeal, District 3, Division C.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following course of action shall be followed for those elections which have been held and which shall be held on November 6, 1990 and December 8, 1990 for those judgeships set forth in Paragraph II which have NOT been precleared by the Attorney General of the United States as required by Section 5 of the Voting Rights Act of 1965:

(1) Those persons elected as judges shall serve provisionally pending the further orders of this Court, and vested with all the power, authority and duties accorded by law.

(2) Within ninety days of the date of this order, the State of Louisiana shall either obtain preclearance of the said judgeships from

the Attorney General of the United States or shall file a suit for a declaratory judgment with the United States District Court for the District of Columbia under the provisions of 42 U.S.C. § 1973c.

(3) If the State of Louisiana files such a declaratory judgment, the incumbent judges may continue to serve in the unprecleared judgeships until one of the following events occurs:

(a) this order requiring preclearance is reversed by the United States Supreme Court;

(b) the State of Louisiana obtains a favorable declaratory judgment from the suit filed in the United States District Court for the District of Columbia;

(c) the Attorney General of the United States approves and preclears the legislation creating

the judicial seat in question;

(d) the Attorney General of the United States approves and preclears a new statutory scheme adopted by the State of Louisiana for the election of judges, and an election is conducted pursuant to that scheme.

(4) Should the event described in either subsections 3(a), (b), or (c) occur, these incumbent judges may remain in office and serve the remainder of their terms of office.

(5) Should the State of Louisiana fail to obtain a favorable declaratory judgment from the suit filed in the United States District Court for the District of Columbia, the incumbent judges in the unprecleared judgeships may remain in office for 150 days after the finality of the judgment in that case.

(6) Should the State of Louisiana fail to obtain preclearance from the Attorney General of the United States or fail to file a suit for a declaratory judgment with the United States District Court for the District of Columbia within the time period set forth in paragraph III(2) above, the incumbent judges in the unprecleared judgeships may remain in office for 150 days following the expiration of that time period.

(7) In the event any vacancy should occur in the unprecleared judgeships by reason of death, resignation or otherwise, such vacancy may be filled according to Louisiana law.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State of Louisiana shall be enjoined from conducting an

election or allowing any person to take the oath of office for the following judgeships:

(1) All judgeships authorized by act 801 of 1987 including:

(a) Third Circuit Court of Appeal, District 1, Division C;

(b) Third Circuit Court of Appeal, District 2, Division C;

(c) Third Circuit Court of Appeal, District 3, Division C.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any election set for November 6, 1990 or December 8, 1990 for judgeships created by Act 801 of 1987 shall be enjoined and cancelled until these judgeships are precleared. If preclearance is obtained, the State of Louisiana shall be required to reopen a qualification period for these judgeships.

V.

IT IS FURTHER ORDERED,ADJUDGED AND DECREED that all previous orders issued in this case which are inconsistent with this order are rescinded or modified in accordance with this order.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of this case for whatever further relief may be necessary or required.

Baton Rouge, Louisiana, October 22, 1990.

/s/ W. Eugene Davis by JVP
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

/s/ John V. Parker
JOHN V. PARKER
UNITED STATES
DISTRICT JUDGE

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT

STATE OF LOUISIANA

JANICE G. CLARK, ET AL

Plaintiffs

CIVIL ACTION
NO. 86-435
SECTION "A"

VERSUS

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA, ET AL

Defendants

ORDER

[Entered October 2, 1990]

This matter having been submitted to the court on the motion of Charles E. "Buddy" Roemer, III, the Governor of Louisiana, in his official capacity for, and on behalf of, the State of Louisiana and the Louisiana District Judges Association, and, for the reasons

previously assigned in open court on September 28, 1990,

IT IS ORDERED, ADJUDGED AND DECREED that the injunction as issued in these proceedings on July 6, 1990 which prohibited the election of state judges in the following districts:

First Judicial District (Caddo Parish)

Fourth Judicial District (Ouachita and Morehouse Parishes)

Ninth Judicial District (Rapides Parish)

Fourteenth Judicial District (Calcasieu Parish)

Fifteenth Judicial District (Lafayette, Acadia and Vermilion Parishes)

Sixteenth Judicial District (Iberia, St. Mary and St. Martin Parishes)

Eighteenth Judicial District (Iberville, Pointe Coupee and West Baton Rouge Parishes)

Nineteenth Judicial District (East Baton Rouge Parish)

Twenty-Fourth Judicial District (Jefferson Parish)

Fortieth Judicial District (St. John the Baptist Parish)

Family Court for the Parish of East Baton Rouge

First Circuit Court of Appeal, District 2,

be and the same is hereby recalled and dissolved.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED that qualifications for the office(s) of judge in each of these aforenamed districts shall occur on Wednesday, October 3rd, 1990, Thursday, October 4th, 1990, and Friday, October 5th, 1990, with the primary election therefore to occur at the time and on the date of the regular scheduled Louisiana general election on November 6, 1990 and a runoff election, if needed, to be held on December 8, 1990.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this election procedure is to be followed and shall occur notwithstanding any Louisiana statutory provision to the contrary.

That a supporting memorandum as required by the rules of this court be waived, but only in this specific instance

Baton Rouge, Louisiana.

/s/ John V. Parker
Chief Judge John V. Parker

October 2, 1990

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT

STATE OF LOUISIANA

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD

Plaintiffs

CIVIL ACTION
NO. 86-435
SECTION "A"

VERSUS

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA

Defendants

ORDER

[Entered October 2, 1990]

The Court having heard arguments today, and for the reasons assigned orally (the Court reserving the

right to expand upon those oral reasons with written reasons):

IT IS ORDERED, ADJUDGED and DECREED that the plaintiffs' motion to enjoin the following judicial elections is denied to the extent that an injunction is sought on qualification of candidates or on enjoining the election. These judicial elections are:

First Judicial District,
Division F
Fourth Judicial District,
Divisions D, F, and G
Ninth Judicial District,
Divisions D and E
Fourteenth Judicial District,
Divisions E, F, G, and H
Fifteen Judicial District,
Divisions E, F, H, and I
Eighteenth Judicial District,
Division C
Twenty-Fourth Judicial
District, Divisions H, I, J,
K, and P
Fortieth Judicial District,
Division C

IT IS FURTHER ORDERED, ADJUDGED and DECREED that in the judicial districts just listed, qualification of

candidates for the office(s) of judge in each of these judicial districts shall occur during normal qualification hours of the Secretary of State of Louisiana on Wednesday, October 3, 1990, Thursday, October 4, 1990, and Friday, October 5, 1990 with the election(s) therefore to occur at the time and on the date of the regular scheduled Louisiana general election on November 6, 1990; a runoff election, if needed, shall be held on December 8, 1990.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the results of these elections shall be promulgated and the winners certified in accordance with Louisiana law, but that any candidate who is certified the winner of any of these elections be and is enjoined from taking office pending further orders of this court.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, pending further orders of this Court, the qualification of candidates for and the election for the First Circuit Court of Appeal, District 2, Division C shall be and is enjoined.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this election procedure is to be followed and shall occur notwithstanding any Louisiana statutory provision to the contrary.

Baton Rouge, Louisiana, October 2, 1990.

JUDGE W. EUGENE DAVIS
UNITED STATES CIRCUIT
JUDGE
FIFTH CIRCUIT COURT
OF APPEALS

/s/ John V. Parker
JUDGE JOHN V. PARKER
CHIEF JUDGE
MIDDLE DISTRICT OF
LOUISIANA

/s/ Frank J. Polozola
JUDGE FRANK J. POLOZOLA
UNITED STATES
DISTRICT JUDGE
MIDDLE DISTRICT OF
LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ET AL

VERSUS CIVIL ACTION

CHARLES "BUDDY" ROEMER, ET AL NO. 86-435-A

ORDER

[Entered September 28, 1990]

The court having heard arguments:

IT IS ORDERED, ADJUDGED and DECREED that the judicial elections referred to in Appendix A attached hereto shall be held as scheduled and the results promulgated and the winners certified in accordance with Louisiana law.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that any candidate who is certified the winner of any of the

above elections be and is enjoined from taking office pending further orders of this court.

Baton Rouge, Louisiana, September 28, 1990.

/s/ W. Eugene Davis
JUDGE W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

/s/ John V. Parker
JUDGE JOHN V. PARKER
CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

APPENDIX "A"

What follows is a list of those judgeships for which elections should be enjoined in the wake of the September 17, 1990 letters from the Justice Department:[1/]

** The following were all the subject of the Justice Department's September 23, 1988 and May 12, 1989 objection letters, and the Justice Department's September 17, 1990 letter said it would not reconsider the previous objections:

District Courts

District	Division	Statute
6	B	Act 515 (1974)

1/ As noted in plaintiffs' previous filings, the plaintiffs are not seeking a Section 5 injunction against judgeships in districts where elections are already enjoined under Judge Parker's Section 2 Order.

[App. "A" to 9-28-90 order, continued]

16	D	Act 104 (1968) Act 56 (1984)
20	B	Act 34 (1981)
21	D	Act 9 (1974)
	F	Act 56 (1984)
23	C	Act 464 (1968)
27	C	Act 158 (1971)
29	C	Act 94 (1970)

Courts of Appeal

First Circuit, District 3	C	Act 114 (1975)
Second Circuit	At-Large	Act 114 (1975)
	At-Large	Act 801 (1987)*
Third Circuit	At-Large	Act 114 (1975)
Third Circuit, District 1	C	Act 801 (1987)*

[App. "A" to 9-28-90 order, continued]

Third Circuit, District 2	C	Act 801 (1987)*
Third Circuit, District 3	C	Act 801 (1987)*

All of the foregoing judgeships except those with an asterisk were filled by election even absent preclearance and most, if not all, are currently occupied by sitting judges. Those with an asterisk were enjoined prior to the initial election, and are vacant.

** In addition, elections for the following judgeships should be enjoined due to objections contained in the Justice Department's September 22, 1988 letter:

-- All judgeships in the 10th and 39th judicial districts inasmuch as the Department of Justice has objected to Act 635 (1979), which split the

[App. "A" to 9-28-90 order, continued]

former 10th judicial district, creating two districts -- the new 10th composed of Natchitoches Parish and the new 39th composed of Red River Parish.

-- All judgeships in the First Circuit Court of Appeal Districts 1 and 3 inasmuch as the Department of Justice has objected to Act 305 (1975), which adopted designated posts (divisions) for all judgeships in those districts. (The plaintiffs do not seek this relief under Section 5 with respect to the First Circuit, District 2, since sufficient relief already is being granted in the Section 2 component of this litigation).

The State of Louisiana requested reconsideration of the objection regarding the 10th and 39th judicial districts, but the Justice Department denied that request in its September 17,

[App. "A" to 9-28-90 order, continued]

1990 letter. No request for reconsideration was made with respect to the objection regarding judgeships in the First Circuit. Elections for all of the judgeships listed in this paragraph were held in prior years despite the absence of preclearance and most, if not all, are currently filled by sitting judges.

** Also, elections should be enjoined for the following judgeships that have recently been created by the Louisiana legislature, but were denied preclearance by the Department of Justice in its September 17, 1990 letter. These have yet to be filled by election:

District Courts

District	Division	Act
26	E	Act 174 (1989)

[App. "A" to 9-28-90 order, continued]

Courts of Appeal

Second Circuit, District 1	C	Act 8 (1990)

(Note: Act 8 of 1990 took the unprecleared at-large Second Circuit judgeship originally created by Act 801 of 1987 and allotted it to Division C of District 1 of the Second Circuit).

Second Circuit District 3	C	Act 8 (1990)

** Finally, elections should be enjoined for the following recently created judgeship which has been submitted by the State for preclearance, but which has not been precleared. It is the subject of a request by the Department of Justice to the State for more information.

District Courts

District	Division	Act
22	G	Act 8 (1990)

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT STATE OF LOUISIANA

JANICE G. CLARK, ET AL

VERSUS

CHARLES "BUDDY" ROEMER, ET AL

CIVIL ACTION

NO. 86-435-A

ORDER

[Entered September 27, 1988]

On August 29, 1988, the court issued an order enjoining primary and general elections scheduled for the Twenty-second Judicial District Court, Division "C"; Second Circuit Court of Appeal, at-large position; Third Circuit Court of Appeal, District 1, Division "C"; District 2, Division "C"; and District 3, Division "C". That order was based upon plaintiffs' motion brought pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c.

By letter dated September 23, 1988, signed by Mr. William Bradford Reynolds, Assistant Attorney General, the United States Attorney General interposed objections to the implementation of Act 801 of 1987 which created the four new judgeships in the Second and Third Circuit Courts of Appeal. Additionally, the United States interposed no objection to Act 23 of 1970 which had created Division "C", Twenty-second Judicial District Court.

The court, being aware of the fact that Act 801 and Act 23 had been submitted to the United States Attorney General, also authorized the Secretary of State to print all ballots for positions authorized by Act 23 and Act 801, and to mail out mail ballots and to deliver printed ballots to the several registrars of voters in the state.

Inasmuch as the United States Attorney General has now objected to the implementation of Act 801, the state defendants are enjoined from further conducting any election for judge, Second Circuit Court of Appeal, at-large and judge, Third Circuit Court of Appeal, District 1, Division "C", District 2, Division "C", and District 3, Division "C" which positions were created by Act 801. To that end the state defendants shall accomplish the following:

1. Upon the opening of each absentee ballot envelope, the parish board of election supervisors or the absentee ballot commissioners shall identify the ballot for the Court of Appeal judgeship but shall not examine for whom the voter voted. Each such absentee ballot shall immediately be placed in the envelope addressed to the Secretary of State of Louisiana labeled "Absentee Ballots, Judge, Court of Appeal." That envelope shall be returned to the Secretary of State and

shall remain sealed but shall be deposited by the Secretary of State with the Clerk of Court, United States District Court, Middle District of Louisiana.

2. The Commissioner of Elections shall delete from the voting machine ballots that portion of the ballot which relates to the election for Judge, for the Second Circuit Court of Appeal, at-large and Judge, Third Circuit Court of Appeal, District 2, Division "C", replacing the deleted portion with a piece of blank ballot stock.

3. The Secretary of State shall provide a sufficient number of "crack and peel" stickers to the Commissioner of Elections who shall transmit sufficient stickers to the Commissioners at each polling place, who shall apply the sticker over the portion of each sample ballot that relates to the candidates for Judge, Court of Appeal.

4. The Secretary of State shall certify that ballot, as altered pursuant to this order, is the correct and official ballot of the State of Louisiana.

5. With regard to the position of Judge, Third Circuit Court of Appeal, District 1, Division "C" and District 3, Division "C", the Secretary of State shall not certify the unopposed candidates as having been elected.

The order of this Court that enjoined the election for Judge, Twenty-second Judicial District Court, Division "C" is hereby vacated.

Baton Rouge, Louisiana, September 27, 1988.

/s/ W. Eugene Davis
W. EUGENE DAVIS,
UNITED STATES CIRCUIT JUDGE

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

/s/ Frank J. Polozola
FRANK J. POLOZOLA,
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT STATE OF LOUISIANA

JANICE G. CLARK, ET AL

VERSUS

CHARLES "BUDDY" ROEMER, ET AL

CIVIL ACTION

NO. 86-435-A

ORDER

[Entered August 26, 1988]

This matter is before the court on a motion for preliminary and permanent injunction to enjoin the holding of elections presently scheduled for the October 1, 1988 primary. The motion is brought under Section 5 of the Voting Rights Act and alleges that two acts of the Louisiana Legislature which created additional judgeships have not been reviewed and "precleared" by the Attorney General of the United States and that no action has been filed in the United

States District Court for the District of Columbia. The parties have stipulated that the court may resolve the issue predicated upon the letter dated August 3, 1988 signed by Kenneth C. DeJean, Esq. on behalf of the Attorney General together with the attachments to that letter, all of which have been filed in the record.

According to the letter, the State of Louisiana has formally submitted Act 23 of 1970 which created Division "C" in the Twenty-second Judicial District Court and has also submitted Act 801 of 1987 which created one additional judgeship for the Second Circuit Court of Appeal and three additional judgeships for the Third Circuit Court of Appeal. The Attorney General of the United States, according to the attachment to Mr. DeJean's letter, on February 26,

1988, requested additional information from the State and the Attorney General has not yet acted. Mr. DeJean concedes that no action has been filed in the United States District Court for the District of Columbia.

Thus, Section 5 of the Voting Rights Act prohibits these measures from becoming effective and consequently, Section 5 prohibits the holding of an election under either statute.

Accordingly, the Governor, the Secretary of State, and all other State defendants are hereby enjoined from conducting any election for any position created by Act 23 of 1970 or Act 801 of 1987 until the Attorney General of the United States acts upon the pending request for "preclearance" or until an action is prosecuted in the district court for the District of Columbia.

The court is aware that an injunction has also issued under Section 2 of the Voting Rights Act and that the injunction therein issued will be reviewed by the Court of Appeals. Should Act 23 of 1970 and Act 801 of 1987 be "precleared" and should the Court of Appeals see fit to modify the injunction issued under Section 2 so as to permit the elections scheduled for the October 1, 1988 primary to proceed, it will be necessary that the ballots have already been printed. Accordingly, the Secretary of State is hereby specifically authorized to print all ballots for positions authorized by Act 23 of 1970 and Act 801 of 1987, to mail out mail ballots and to deliver printed ballots to the several registrars of voters in the State, pending action by the Court of Appeals and by the Attorney General of

the United States. This modification applies strictly to printing and delivery of the ballots, not conducting the elections.

Baton Rouge, Louisiana, August 26, 1988.

/s/ W. Eugene Davis
W. EUGENE DAVIS,
UNITED STATES CIRCUIT JUDGE

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

/s/ Frank J. Polozola
FRANK J. POLOZOLA,
DISTRICT JUDGE, M.D.L.A.

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant
Attorney General

September 23, 1988

Kenneth C. DeJean, Esq.
Chief Counsel
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This refers to Act 23, H.B. No. 315 (1970), which provides for an additional judgeship in the 22nd Judicial District and a special election therefor; Act 801, S.B. No. 270 (1987), which creates an additional judgeship for each of the three judicial districts in the Third Circuit Court of Appeals and an additional circuitwide judgeship in the Second Circuit Court of Appeals, and provides special elections therefor; and

Act 200, H.B. No. 451, (1988), which changes the special election date under Act 801 (1987), for the State of Louisiana submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the information to complete your submission of Act 23 on August 23, 1988 and of Acts 801 and 200 on August 19, 1988. In accordance with your request, expedited consideration has been given these submissions pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

This also refers to our letters of August 31, September 4, September 14, and September 29, 1987, which requested additional information concerning the voting changes relating to other judicial election districts as identified in

Attachment A for the State of Louisiana, submitted to the Attorney General on July 1, 2, 6 and 31, 1987, pursuant to Section 5. Our records indicate that we have not received your response with regard to these matters.

We have considered carefully the information you have provided, as well as information from the Census and other interested parties. In addition, we have reviewed the findings of the federal district court in Clark v. Roemer, No. 86-435-A (M.D. La., orders of August 10, 15, and 31, 1988), dealing with the election of judges in the State of Louisiana. We note the court's finding that the existing at-large method of election, with designated posts and a majority vote requirement, results in a violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, in the Second

and Third Circuits, including each of their election subdistricts, and in each of the other judicial districts identified in Attachment A. The court did not, however, make a discrete finding of a Section 2 violation regarding the existing election system in the 22nd Judicial District. However, the court found that elections throughout the State of Louisiana and in each of its judicial districts were characterized by racially polarized voting.

With regard to the instant changes in the Second and Third Circuits and those identified in Attachment A, the state is seeking to add elective judgeship positions under an election system that has been found to violate Section 2 of the Voting Rights Act. Likewise, with regard to the proposed redistricting of the 10th Judicial

District, the resulting election method for the district is one which the court has found to violate Section 2. Thus, in the circumstances existing in Louisiana, these proposed judgeship positions and the submitted boundary line change cannot be implemented except in the context of a racially discriminatory election method.

With regard to the adoption of designated posts in the First Circuit, we note that the black proportion of the population in each of the three districts within the First Circuit is at a level that would permit black voters an opportunity to elect a candidate of their choice, absent anti-single-shot voting devices. In the context of racially polarized voting that exists in the area, the imposition of designated posts, which prevents minority voters from utilizing the technique of single-shot voting,

effects a retrogression in the position of minority voters within the meaning of Beer v. United States, 425 U.S. 130, 146 (1976) even aside from the court's finding in Clark that the implemented election system in District 2 and 3 of the First Circuit, including the use of the unprecleared numbered posts, violates Section 2 of the Voting Rights Act.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In addition, a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Voting Rights Act. See 28 C.F.R. 51.55(b). In light of these principles and the

considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the changes under Act 801 (1987) and Act 200 (1988), the proposed designated posts in the First Circuit, the proposed redistricting of the 10th Judicial District, and the other changes enumerated in Attachment A meet the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the implementation of those changes.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United Sates District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, Section

51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the implementation of the changes under Act 801 (1987) and Act 200 and the changes identified in Attachment A legally unenforceable. See also 28 C.F.R. 51.10.

With regard to the proposed change in the 22nd Judicial District, the Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such

change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.41 and 51.43.

In interposing no objection to the additional judgeship in the 22nd Judicial District, we are not unmindful that the late submission of a proposed remedial single-member districting plan likely prevented the court from making a specific finding of a Section 2 violation in the 22nd Judicial District, based on the court's criteria for issuing its amended findings of fact. We note also that the court in Clark, although not finding a discrete Section 2 violation in the 22nd Judicial District or in other

challenged districts in which voting changes are pending our review, did find that the state's election method for judges produced a systemic violation of Section 2. In addition, and as noted earlier, the court recognized the existence of racial bloc voting in judicial elections throughout the state, including those in the 22nd Judicial District, and it is well recognized generally that the use of a majority vote requirement and anti-single-shot provisions, such as numbered posts, enhances the opportunity to discriminate against minority voters in an at-large electoral system characterized by racially polarized voting. Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (citing S. Rep. No. 417, 97th Cong. 2d Sess. 28-29); see also City of Rome v. United States, 446 U.S. 156, 184 & n.19 (1980)

(citing U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, 206-07 (1975)). In these circumstances, our review has raised concerns that the existing election method in the 22nd Judicial District, as well as in other multi-member judicial districts, may indeed violate Section 2, and attorneys in our Voting Section will continue to look at these issues to determine whether further action of that nature may be appropriate.

Finally, our understanding of the court's decision in Clark is that the state may hold scheduled elections on October 7 for any judicial position that pre-dates the Voting Rights Act or that has received the requisite Section 5 preclearance. The court has, however, directed the state to fashion a remedy consistent with the court's findings. As

we read those findings, preclearance of the additional judgeship in the 22nd Judicial District, or in any other district challenged in Clark, does not relieve the state of its responsibility to consider appropriate remedial adjustments in those districts, where such action is necessary to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice. Such adjustments may include not only the use of single-member districts but such other corrective measures as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single shot voting devices and the majority vote requirement, that impede minority participation.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Louisiana plans to take regarding these matters. If you have any questions concerning this letter, you may feel free to call Lora L. Tredway, Section 5 Attorney-Reviewer in the Voting Section (202-724-8290).

Because the status of the submitted changes is at issue in Clark v. Roemer, supra, we are providing a copy of this letter to the court in that case.

Sincerely,

/s/Wm. Bradford Reynolds
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
United States Chief District Judge

ATTACHMENT A

Judicial District Court Districts	Voting Changes
1st	Act 117 (1973), which creates an additional judgeship and a special election therefor
4th	Act 480 (1970), which creates an additional judgeship position
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
9th	Act 158 (1971), which creates an additional judgeship
	Act 19 (1974), which creates an additional judgeship and a special election therefor

Judicial District Court Districts	Voting Changes
	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
14th	Act 40 (1979), which creates an additional judgeship and a special election therefor
	Act 332 (1975), which creates an additional judgeship and a special election therefor
	Act 322 (1980), which creates an additional judgeship

Judicial District Court Districts	Voting Changes
15th	Act 360 (1970), which creates an additional judgeship and a special election therefor
	Act 43 (1976), which creates an additional judgeship
	Act 322 (1980), which creates an additional judgeship
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
18th	Act 86 (1968), which creates an additional judgeship and a special election therefor
20th	Act 34 (1981), which creates an additional judgeship

Judicial District Court Districts	Voting Changes
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and a special election therefor

Judicial District Court Districts	Voting Changes
27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
Orleans Parish Criminal District Court	Act 236 (1972), which creates an additional judgeship and a magistrate
	Act 143 (1975), which creates five additional judges and decreases terms from 12 to 6 years
Orleans Parish Civil District Court	Act 129 (1975), which creates five additional judgeships and decreases terms from 12 to 6 years

Judicial District Court Districts	Voting Changes
First Circuit, Districts 1, 2, and 3	Act 305 (1975), which adopts designated posts (divisions) for all judgeships
First Circuit, District 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Second Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant
Attorney General

May 12, 1989

Kenneth C. DeJean, Esq.
Chief Counsel
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This refers to Act No. 235, H.B. No. 739 (1970), which creates an additional judgeship (Division J) for the Orleans Parish Civil District Court, and Act No. 56, H.B. No. 477 (1984), which creates two additional judgeships (Divisions F and G) for the 4th Judicial District and one additional judgeship for the 12th Judicial District (Division B), the 16th Judicial District (Division G), and the 21st Judicial District (Division F); recodifies the creation of the 40th Judicial District from the 29th Judicial

District, and the transfer of two judgeship positions from the 29th Judicial District to the 40th Judicial District; designates the two judgeship positions in the 40th Judicial District as Divisions A and B, and designates the three judgeship positions in the 29th Judicial District as Divisions C, D, and E; and provides for the implementation of the new 29th and 40th Judicial Districts and the election of the five judgeship positions from the respective districts in the November 1984 general election, for the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission of Act No. 235 on March 13, 1989 and of Act No. 56 on March 14, 1989.

To the extent that the provisions of Act No. 56 (1984) effect a change in the 12th Judicial District, the Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. See also 28 C.F.R. 51.41.

With respect to the remaining changes, however, we reach a different conclusion. We have considered carefully the information you have provided, as well as information from the Census and other interested parties and, most importantly, the findings of the federal district court in Clark v. Roemer, No. 86-453-A (M.D. La. orders of August 10,

15, and 31, 1988), dealing with the election of judges in the State of Louisiana. The court in Clark found that the existing at-large method of election, with designated posts and a majority vote requirement, results in a violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, in the 4th, 16th, 21st, 29th, and 40th Judicial Districts and the Orleans Parish Civil District Court district.

Thus, as was true of the judgeship positions to which an objection was interposed in our letter of September 23, 1988, the statutes here seek, inter alia, to add or implement elective judgeship positions under an election system that has been found to violate Section 2 of the Voting Rights Act in the 4th, 16th, 21st, 29th, and 40th Judicial Districts and the Orleans Parish Civil

District Court district. (A copy of our September 23, 1988 objection letter is enclosed.) I note, too, that among these changes is a judgeship (Division C in the 29th Judicial District), the initial creation of which was also the subject of the Attorney General's September 23, 1988, objection regarding Act No. 94 (1970), and the initial creation of the Division J judgeship for the Orleans Parish Civil District Court, a position which was the subject of the objection interposed on September 23, 1988, with respect to Act No. 129 (1975).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In addition, a submitted change

may not be precleared if its implementation would lead to a clear violation of Section 2 of the Voting Rights Act. See 28 C.F.R. 51.55(b). In light of these principles and the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the provisions of Act No. 235 (1970), which creates an additional judgeship position for the Orleans Parish Civil District Court, and the provisions of Act No. 56 (1984) with respect to the judgeship positions in the 4th, 16th, and 21st Judicial Districts, all to be implemented under an at-large system with designated posts and a majority vote requirement, meet the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the implementation of these changes. I also must object to the

implementation of Act No. 56 (1984) insofar as it seeks to implement changes to which we interposed an objection on September 23, 1989, with regard to the 29th and 40th Judicial Districts.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the

objected-to provisions of Act No. 235 (1970) and Act No. 56 (1984) legally unenforceable. See also 28 C.F.R. 51.10.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Louisiana plans to take regarding these matters. If you have any questions concerning this letter, you may feel free to call Lora L. Tredway, Section 5 Attorney-Reviewer in the Voting Section (202-724-8290).

Because the status of the submitted changes is at issue in Clark v. Roemer, supra, we are providing a copy of this letter to the court in that case.

Sincerely,

/s/ James P. Turner
James P. Turner
Acting Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
United States Chief District Judge

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant
Attorney General

September 17, 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.c. 1973c, to the following voting changes for the State of Louisiana:

> Orleans Parish Criminal District Court: Act 236 (1972), which creates an additional judgeship and a magistrate, and Act 143 (1975), which creates five additional judges and decreases terms from twelve years to six years;

> Orleans Parish Civil District Court: Act 235 (1970), which creates an additional judgeship position (Division J), and Act 129 (1975), which creates five additional judgeships and decreases terms from twelve years to six years.

We received your requests on June 19 and 26 and August 3, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to Act No. 8, S.B. No. 345 (1990), to the extent that it creates the thirteenth and fourteenth at-large judgeships (Divisions M and N) for the Orleans Parish Civil District Court; and provides an implementation schedule therefor for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We received your submission on June 19, 1990; supplemental information was received July 12 and 17, 1990.

At the outset, we note that when the state originally submitted Acts 129 and 143 (1975), the submissions characterized the voting changes as an increase from five to ten judgeship positions for both the civil and criminal district courts in Orleans Parish. Although we asked for clarification of the voting changes effected by these statutes, we have not received your response. Our further analysis, however, indicates the following:

(1) Act 129 recodifies ten judgeship positions, eight of which received the requisite Section 5 preclearance in 1986. Accordingly, the effect of the September 23, 1988, objection applied only to the tenth judgeship position (Division J) for the Orleans Parish Criminal District Court, a position that was initially

created under Act 235 (1970) and recodified by Act 129 (1975).

(2) Act 143 (1975) recodifies ten judgeship positions, seven of which antedate the state's coverage under Section 5. Accordingly, the effect of the September 23, 1988, objection to Act 143 (1975) applied only to three judgeship positions for the Orleans Parish Criminal District Court.

We have carefully reviewed the information you have provided, as well as comments and information from other sources and interested parties. Our analysis indicates that the changes do not have the purpose and will not have the effect of discriminating on the basis of race or color and that implementation of the changes will not lead to a clear violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Accordingly,

the objections interposed September 23, 1988, and May 12, 1989, to the specified changes for the Orleans Parish Civil and Criminal District Courts are hereby withdrawn. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48 and 51.55).

With regard to the changes under Act 8 (1990) for the Orleans Parish Civil District Court, the Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See 28 C.F.R. 51.41.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant
Attorney General

September 17, 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
State of Louisiana
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your requests on June 19 and 26 and August 10, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to the voting changes identified in Attachment B for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We received your submission of Act 8 (1990) on June 19, 1990; supplemental information concerning those changes was received June 26 and July 12 and 17, 1990. We received the information to complete your submission of the remaining changes identified in Attachment B on July 17, 1990.

At the outset we begin with a recitation of some of the events which have preceded our review of all the voting changes which are before us today because those events play an important part in our consideration of these matters. You may recall that in 1987, we sent the State a number of letters requesting information concerning

numerous voting changes within judicial election circuits and districts in Louisiana, including a request that the State respond to allegations that the method of electing trial and appellate court judges discriminated against minority voters. The State, however, failed to respond to our requests.

Meanwhile, in 1988, the court in Clark v. Edwards -- a suit brought in 1986 by private plaintiffs challenging the method of electing judges in Louisiana -- found that the method of electing trial and appellate court judges produced a "systemic" violation of Section 2 of the Voting Rights Act. By the time of the court's 1988 decision, the State still had not supplied us with the additional information we needed to analyze the voting changes in judicial circuits and districts then pending

before us. Consequently, we used the record and findings from the Clark lawsuit to analyze the voting changes that were then pending before us for Section 5 review. On September 23, 1988, an objection was interposed under Section 5 of the Voting Rights Act.

In 1989, the State again submitted voting changes to us for Section 5 review and, there again, sought Section 5 preclearance of voting changes in judicial circuits and districts that had been found by the court in Clark to be racially discriminatory or had otherwise been the subject of the Section 5 objection interposed in 1988. Thus, on May 12, 1989, a Section 5 objection was interposed to the implementation of those changes.

Later that year, in the summer of 1989, the State adopted a new election

scheme, intended to remedy both the Section 2 violations found by the Clark court and the Section 5 objections interposed by the Attorney General in 1988 and 1989. However, because the proposed system created new senior judgeship positions in an apparent effort to accommodate and protect incumbent judges who might otherwise lose their seats if a racially fair election scheme were put in place, it required the approval of the voters in a state-wide referendum. As you know, that proposed scheme was disapproved by the voters in a November 1989 referendum.

Remedial proceedings in the Clark lawsuit were held earlier this year and those proceedings culminated in additional findings from the court. Clark v. Roemer, No. 86-435 (M.D. La., Orders of June 12 and July 6, 1990). On

the basis of those findings alone, the State now seeks reconsideration of the previously interposed objections, as well as Section 5 preclearance of other voting changes which were either never before the court in the Clark litigation or were otherwise not before that court in the same circumstances as they are before us under Section 5. These include the 10th, 24th, 26th and 40th Judicial Districts, and the 2nd and 3rd Circuit Courts of Appeal. With regard to these judgeship positions and the proposed method of election therefor, we find the Clark decision to be inapposite because it pertains to factual circumstances in a judicial district different from the judicial district now before us for Section 5 review.

In that regard, we note that the differing factual circumstances are

not insignificant. For example, one aspect of the Clark litigation involved a challenge to the method of electing judges in the 26th District. Because the State had not obtained Section 5 preclearance of the creation of a fifth judgeship in that District, the court in Clark examined the evidence in the context of four existing judgeships. Because the State has submitted to us a proposal to add a fifth judgeship to the 26th District, however, we are reviewing the method of electing judges in that district as it would exist if five judges were being elected. This distinction is critical because the Clark court found that a sample single-member district drawn in that District by private plaintiffs did not satisfy the requirement under Thornburg v. Gingles, 478 U.S. 30 (1986), that the minority

group be shown to be sufficiently large and geographically compact to constitute a majority in a single-member district. As a result, though the at-large multimember structure in the 26th District now has been found by the court in Clark not to violate Section 2 because of that finding, the court properly made no determination with regard to the method of election if five judges were to be elected from that district.

Another example of how the facts and circumstances before us differ from those which were before the court in Clark is in the 2nd Circuit Court of Appeal. In the 2nd Circuit, the claims before the Clark court involved a challenge to a mixed election system for seven judges, in which one judge was elected at large circuitwide and six judges were elected from three double-

member districts. We, however, are reviewing the creation of additional judgeship positions for the 2nd Circuit in the context of proposed changes to the electoral structure: first, to an interim scheme of one circuitwide position, one double-member district and two triple-member districts; and, second, to an election scheme that subsequently will be comprised of three triple-member districts with at-large elections by designated posts, staggered terms, and majority vote. Similarly, as to the 3rd Circuit, the Clark litigation involved a challenge to a scheme of three at-large circuitwide positions and three double-member districts, while we have been asked to assess the creation of additional judgeship positions in the context of an electoral structure that provides for three at-large circuitwide

positions and three triple-member districts.

The fact, then, that the Clark court has vacated some of its findings as to a violation under Section 2 does not in and of itself afford a basis for withdrawing the objection under Section 5 to the voting changes involved. Indeed, during our reconsideration of the objected-to voting changes and our review of the additional voting changes that you have submitted, you have provided us with additional information concerning the voting changes and judicial districts at issue by incorporating information contained in certain Section 5 submissions that you made in 1989 and in response to our requests during the current review period. Much of the information does not appear to have been before the court in the Clark case. For

example, in analyzing voting patterns to determine whether black voters are politically cohesive and whether whites vote sufficiently as a bloc usually to defeat the choice of black voters, the court in several instances did not have the benefit of any data concerning parishwide election contests or data by parish for contests involving a number of parishes. We have analyzed such data, and our analysis indicates a significant degree of racially polarized voting in the districts at issue. Also, we have been able to analyze information that was not before the court concerning the racial identity of federally-registered voters, as well as demographic and voting information concerning modifications to alternative election schemes that demonstrate the geographical

concentration of black persons in certain judicial districts.

Nor can we overlook the fact that in the face of findings of a systemic Section 2 violation by the Clark court in 1988, and notwithstanding the interposition of far-reaching Section 5 objections in 1988 and 1989, the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the Clark court has given the State ample opportunity to do so. While, as noted above, the State did propose a new election scheme in 1989, it did so in a way which was intended also to protect incumbent judges. It is also particularly telling that there is nothing in Louisiana law we are aware of which would prevent the State from simply adopting a racially fair election scheme

without incorporating referendum requiring provisions such as that connected with the earlier proposal aimed at current officeholders. Thus, the State's failure and refusal to adopt any remedial measures without also seeking to protect incumbents, the vast majority of whom are white, would appear to be elevating the State's concern for protecting white incumbents over the vindication of minority voting rights.

It is also significant that in several judicial districts, the State has available to it any number of alternative election schemes in which black voters clearly would have the opportunity to elect candidates of their choice. Yet, the State has not adopted any of these alternatives. For example, with regard to the proposed redistricting of the 10th District, we note that the State proposes

to carve out one parish in order to create a new single-member judicial district, the 39th District, which has a 36.4 percent black population. The State thus chose to divide the 10th District in a manner that created one majority-white, single-member district, even though a single-member judicial district could be created which would have a substantial black-majority population. While we are cognizant that the proposed boundary lines apparently are based on parishes as the basic building blocks, these lines are not jurisdictional in nature but serve merely to outline the boundaries of the districts for election purposes. Accordingly, strict adherence to this criterion results in the dilution of a cohesive black population within the proposed new districts. Moreover, the State has deviated from this criterion in

devising the districts of the 5th Circuit Court of Appeal which, inexplicably, the state has chosen not to do with regard to the proposed 10th and 39th Districts.

Similarly, with regard to the 2nd Circuit Court of Appeal, which has a 34.2 percent black population, there are alternatives for electing the proposed nine judges in which black voters would have a realistic opportunity to elect candidates of their choice. Also, with regard to the 3rd Circuit Court of Appeal, which has a 23.7 percent black population, available alternatives for the proposed twelve judges would afford black voters the opportunity to elect candidates of their choice. As noted in our 1988 objection letter, such remedial alternatives would not necessarily require the State to draw single-member districts in every instance since, in a

number of areas, the State could retain the multimember system utilizing limited or cumulative voting and abandoning the use of the racially discriminatory features such as numbered posts and majority vote which enhance dilution in those circuits.

In 1988, the Clark court admonished the State to "revise the [judicial election] system- to cast about the alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." Clark v. Edwards, 725 F.Supp. 285 (M.D. La. 1998). So too, in 1988, we informed the State it had a responsibility to consider appropriate remedial adjustments to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice.

Notwithstanding these suggestions, the State has steadfastly adhered to the racially discriminatory multimember scheme and has resisted efforts in the Clark case to create single-member districts. Yet, as noted earlier, single-member districts are not the only available remedy. Indeed, our September 23, 1988 letter expressly observed that other corrective measure were available to the State, such "as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single shot voting devices and the majority vote requirement, that impede minority participation." The State has chose not to avail itself of such remedial options.

Under Section 5 of the Voting Rights Act, the submitting authority has

the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, the submitting authority must demonstrate that the choices underlying the proposed change are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); City of Rome, supra, at 172; Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982); aff'd, 459 U.S. 1166 (1983). While we do not in any way question the State's need for or purpose in creating new judgeship positions, we do find ourselves unable to

conclude that the State has carried its burden of showing the absence of the proscribed purpose in its insistence on maintaining and expanding the existing dilutive system for electing candidates to those positions, a system that has been found by the court, or our analysis, to be violative of Section 2 of the Voting Rights Act. See, e.g., 28 C.F.R. 51.55(b). Therefore, on behalf of the Attorney General, I must continue the objection to the implementation of the changes enumerated in Attachment A and object to the changes enumerated in Attachment B.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United states District Court for the District of Columbia that the changes do not have the purpose and

will not have the effect or result of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objections by the Attorney General is to continue the legal unenforceability of the changes identified in Attachments A and B. See also 28 C.F.R. 51.10.

Because this matter remains pending before the court in Clark, we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

Michael M. Rubin, Esq.
Fred J. Cassibry, Esq.
Robert G. Pugh, Esq.
Kenneth C. DeJean, Esq.
John N. Kennedy, Esq.
Jack C. Benjamin, Esq.
George A. Blair, III, Esq.
Anthony Skidmore, Esq.
Robert P. McLeod, Esq.
Harry Rosenberg, Esq.
Ernest L. Johnson, Esq.
Robert B. McDuff, Esq.
Ulysses Gene Thibodeaux, Esq.

ATTACHMENT A

Judicial District Court Districts	Objected-to Voting Changes
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division G)
-20th	Act 34 (1981), which creates an additional judgeship
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division F)

23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and the special elections therefor
27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
	Act 56 (1984), which recodifies the additional judgeship under Act 94 (1970)

Circuit Courts of Appeal	Objected-to Voting Changes
First Circuit Districts 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Second Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
	Act 801 (1987), which creates an additional circuitwide judgeship and special election therefor
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit, Districts 1, 2, and 3	Act 801 (1987), which creates an additional judgeship in each district and special elections therefor
	Act 200 (1987), which changes the special election dates under Act 801 (1987)

ATTACHMENT B

Judicial Districts	Voting Changes
24th	Act 8 (1990), which creates an additional (sixteenth) judgeship
26th	Act 174 (1989), which creates an additional judgeship
40th	Sections 3(A) and 3(B) of Act 611 (1989) and Act 608 (1989), which create an additional judgeship position (Division C)
2nd Circuit Court of Appeal	Act 8 (1990), which creates a ninth judgeship position to be elected by designated Division C in 2nd Circuit District 3; provides for a change in method of election for 2nd Circuit judges from two elected at-large circuitwide and two elected from each district by designated divisions to three elected from each district by designated divisions, except as specified for the incumbent in

	the at-large position to be converted to the Division C position of Second Circuit District 2; provides that the judgeship position created by Act 801 (1987) will be elected as the designated Division C position from 2nd Circuit District 1; and provides an implementation schedule therefor

U.S.Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant Attorney General

October 9, 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider the September 23, 1988, objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your request on August 10, 1990.

Under the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, an objection shall be withdrawn "if the Attorney General is satisfied that the change does not have

the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.48(b). In its request for reconsideration the State of Louisiana has offered no new information or arguments to show that the electoral method by which its additional judges will be elected is not racially discriminatory. Rather, it appears that the State seeks a clarification of the reach of the Attorney General's objection.

In that regard, we iterate here what we sought to make clear in our September 23, 1988, objection letter, that our concerns under Section 5 went to the proposed method of electing judges and not to the number of judges per se. As we have suggested previously on a number of occasions, adoption by the

State of a racially fair election scheme would provide an appropriate basis for withdrawing the objection. Until such time as the objection is withdrawn, however, the State may not lawfully implement any part of the process for electing those judicial positions which are the subject of outstanding Section 5 objections. See NAACP v. Hampton County Election Commission, 460 U.S. 166 (1985).

Under these circumstances, then, we see no basis for altering our earlier conclusions in this matter. Accordingly, on behalf of the Attorney General, I must decline to withdraw the September 23, 1988, objection.

Of course, in making this determination, we are cognizant of the recent decision of the Fifth Circuit Court of Appeals in LULAC v. Mattox, No. 90-8014 (5th Cir. September 28, 1990) (en

banc) and we are studying the Court's decision in that case to determine how, if at all, it may impact upon our enforcement responsibilities under the Voting Rights Act. However, we feel a responsibility to point out that we do not presently see that decision as immediately affecting the previously interposed objections to judicial elections in Louisiana.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

ATTACHMENT A

Judicial District Court Districts	Voting Changes
1st	Act 117 (1973), which creates an additional judgeship and a special election therefor
4th	Act 480 (1970), which creates an additional judgeship position
9th	Act 19 (1974), which creates an additional judgeship and a special election therefor
14th	Act 40 (1967), which creates an additional judgeship and a special election therefor
	Act 332 (1975), which creates an additional judgeship and a special election therefor
	Act 322 (1980), which creates an additional judgeship
15th	Act 360 (1970), which creates an additional judgeship and a special election therefor
	Act 43 (1976), which creates an additional judgeship
	Act 322 (1980), which creates an additional judgeship
18th	Act 86 (1968), which creates an additional judgeship and a special election therefor

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant
Attorney General

November 20, 1990

Cynthia Young Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to Act No. 8, S.B. No. 345 (1990), which creates a seventh at-large judgeship position (Division G) for the 22nd Judicial District in the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Supplemental information was received on November 5 and 8, 1990.

We have carefully considered the information you have provided, as well as comments and information from the

Bureau of Census and other interested parties. At the outset, we note that the state proposes to elect this position under the existing at-large/designated post system with a majority vote requirement and, thus, its implementation serves as an expansion of that system. We further note that the provisions of Act 8 (1990) were adopted in the context of the concerns expressed in our September 23, 1988, letter to the state, in which we interposed Section 5 objections to the creation of numerous additional judgeship positions, although we precleared the creation of a sixth judgeship position (Division C) for the 22nd Judicial District.

In that letter we advised the state that our review of the sixth judgeship position in the 22nd Judicial District had "raised concerns" that the

at-large/designated post/majority vote election method may well have violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973. We explained how it is generally well recognized that the use of a majority vote requirement and anti-single-shot voting requirements, such as designated posts, enhance the opportunity to discriminate against minority voters in an at-large electoral system characterized by racially polarized voting. We noted that the court in Clark v. Roemer, No. 86-435-A (M.D. La.), indeed had found the existence of racially polarized voting in the 22nd Judicial District.

Furthermore, in our September 23, 1988, letter, we explicitly advised the state that preclearance of the sixth judgeship position did not "relieve the state of its responsibility

to consider appropriate remedial measures" in any judicial district where "such action is necessary to afford black voters an opportunity to elect candidates of their choice." We suggested that such adjustments might include the use of single-member districts or "other corrective measures" (e.g., limited or cumulative voting schemes) and "the elimination of restrictive election features, such as anti-single-shot voting devices and the majority vote requirement, that impede minority participation."

Our analysis indicates, first of all, that the addition of a seventh judgeship position to be elected under the at-large/designated post / majority-vote system makes this most recent expansion of that system an even clearer violation of Section 2 and, secondly,

that the state has taken no measures to ensure that the election method in the 22nd Judicial District affords black voters an opportunity equal to that of white voters to elect candidates of their choice to any of the judicial positions in the district. Rather, the state has merely expanded an election system that appears to deny black voters such an opportunity, and has done so in apparent disregard of the wishes of black citizens and of the concerns raised by our September 23, 1988, letter.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R.

51.52). In addition, under our guidelines a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Act. See also 28 C.F.R. 51.55. As we advised the state on September 17, 1990, while we do not in any way question the state's need for creating new judgeship positions, we do find ourselves unable to conclude that the state has carried its burden of showing the absence of proscribed purpose in its insistence on maintaining and expanding an election system which does not afford black voters a realistic opportunity to elect their preferred candidates. In light of all the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state has satisfied its Section 5 burden with regard to the seventh judgeship position

in the 22nd Judicial District. Therefore, on behalf of the Attorney General, I must object to Act 8 (1990), to the extent that it requires implementation of the seventh judicial position (Division G) under the existing at large/designated post/majority-vote election system in the 22nd Judicial District.

We hasten to add, however, that we have noted your argument for Section 5 preclearance based on the decision in League of United Latin American Citizens Council No. 4434 v. Clements (LULAC), No. 90-8014 (5th Cir. Sep. 28, 1990) (en banc), in which the court held that the Section 2 results standard does not apply to judicial election systems. The court, however, expressly recognized that "Section 5 of the Act applies to state judicial elections," id. slip op. at 20,

and until this matter is clarified further by the courts, we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the further expansion of the at-large / designated post/ majority-vote

election system through the additional judgeship under Act 8 (1990) for the 22nd Judicial District continues to be legally unenforceable.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Louisiana plans to take with regard to this matter. If you have any questions, feel free to call Ms. Lora L. Tredway (202-307-2290), an attorney in the Voting Section.

Because this matter remains pending before the court in Clark, we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

Michael M. Rubin, Esq.
Fred J. Cassibry, Esq.
Robert G. Pugh, Esq.
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U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

Office of the Assistant
Attorney General

November 20, 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to the September 23, 1988, objection, under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Act 515 (1974), which creates an additional judgeship (Division B) and provides for a special election therefor in the 6th Judicial District of the State of Louisiana.

As you know, on September 17, 1990, the Attorney General declined to withdraw the objection, based on the information that was then available.

Since that time, we have received and carefully reviewed additional factual information relevant to the creation and implementation of the Division B judgeship position. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.46). More specifically, our analysis of the October 6, 1990, election returns has led us to further reconsider our determination with regard to the 6th Judicial District, and, based on that reconsideration we are satisfied that the concerns we previously entertained no longer prevail in that district. Accordingly, the objection interposed September 23, 1988, and continued September 17, 1990, to the specified changes under Act 515 (1974) is hereby withdrawn. See 28 C.F.R. 51.48 and 51.55. However, we feel a responsibility to point out that Section 5 of the Voting

Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. 28 C.F.R. 51.41.

Because this matter remains pending before the court in.

Clark v. Roemer, No. 86-435-A (M.D. La.), we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court
Michael H. Rubin, Esq.
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Ulysses Gene Thibodeaux, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

----------x

JANICE G. CLARK, et al.

Plaintiffs,

v. CIVIL ACTION
NO. 86-435
SEC. A

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; et al.

Defendants.

----------x

NOTICE OF APPEAL TO
THE UNITED STATES SUPREME COURT

[Filed, October 26, 1990]

The plaintiffs, Janice Clark, et al., file this notice of appeal to the United States Supreme Court from the decisions of the three-judge district court dated September 28, 1990, October 2, 1990, October 22, 1990, and October 24, 1990. This appeal is filed pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253.

Respectfully submitted,

/s/ Ernest L. Johnson
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

----------X

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOKS, CONNIE SADLER, LLOYD DANGERFIELD, TOM NELSON, ALBERT RICHARD, BRENDA FORD, EDWARD LARVADAIN, AND JOSIE FRANK, on behalf of themselves and all others similarly situated,

Plaintiffs,

v. CIVIL ACTION
NO. 86-435
SEC. A

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES,

Defendants.

----------X

SUPPLEMENTAL NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT.

[Filed November 6, 1990]

The plaintiffs, Janice G. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott,

Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated, file this notice of appeal to the United States Supreme Court from the decisions of the three-judge district court dated September 28, 1990, October 2, 1990, October 22, 1990, October 24, 1990, and October 31, 1990 (the latter apparently was docketed on November 1, 1990). This appeal is filed pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253. This notice of appeal is intended to supplement the prior notice of appeal filed in this case,1 and is not intended to displace that prior notice of appeal.

Respectfully submitted,

/s/ T. Richardson Bobb
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Counsel for Plaintiffs

---

1 For instance, this notice of appeal relates to the October 31 order of the district court, which was not available and was not included in the earlier notice of appeal filed on October 26.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1979b(a) of this title based upon determinations made under the second sentence of section 1979b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title

based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or

other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three

judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(2)

No. 90-952

Supreme Court, U.S.
FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Appellants,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

MOTION TO DISMISS OR AFFIRM

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No. 90-952

In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Appellants,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

MOTION TO DISMISS OR AFFIRM

This is a direct appeal from an Order, rendered and entered on October 22nd, 1990,[1] and an Opinion,

[1] *See* Appendix to Jurisdictional Statement [hereinafter "App."] 68a through 80a.

rendered and entered on October 31st, 1990,[2] by a district court of three judges, specifically constituted pursuant to 28 U.S.C. § 2284.

Appellees, pursuant to Rule 18.¶.6. of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment and decree of the three-judge court on the ground that it is manifest that the questions on which this case depends are so unsubstantial as not to need any further argument.

STATEMENT OF THE CASE

This appeal involves questions under Section 5 of the Voting Rights Act. Because the same suit involves Section 2(b) of the Voting Rights Act and because most of the litigation thus far has involved that Section, the procedural history of this case requires an initial discussion of the Section 2(b) claims.

A. The Voting Rights Act Section 2(b) Claim

Appellants brought this lawsuit in 1986 in the United States District Court for the Middle District of Louisiana as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consisted of all black voters in the State of Louisiana. The action challenged the at-large voting system for the election of District, Family Court and Courts of Appeal judges as

[2] *See* App. 1a through 67a.

being in violation of the 1965 Voting Rights Act, as amended, because, allegedly, the use of an at-large system results in a denial or abridgment of the right to vote of appellants and all those similarly situated on account of race and color.

The district court ultimately held in August 1988, that the at-large judicial election system did violate Section 2 of the Voting Rights Act. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). The district court enjoined judicial elections which were scheduled for Fall, 1988. This injunction was overturned by the United States Court of Appeals for the Fifth Circuit. *Clark v. Roemer*, 88-3626 (5th Cir. 1988 unreported). An Application for Stay to this Court was denied by Circuit Justice White. When the Application was resubmitted to Justice Marshall, he submitted it to the full Court, which once again denied the stay. *Clark v. Roemer*, 487 U.S. 1266, 109 S.Ct. 29, 101 L.Ed.2d 979 (1988).

In February, 1990, the district court held a remedy trial, ultimately ordering subdistricting in nine District Courts, the Family Court in East Baton Rouge Parish, and in a district of one Court of Appeal. The district court reversed its earlier decision and held that violations had not been proven in 54 districts.

On September 28, 1990, the Fifth Circuit rendered its *en banc* decision in the case of *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), holding that Section 2(b) of the Voting Rights Act does not apply to the judiciary. The district court in this case then granted a Rule 54(b) motion filed by appellees dismissing:

> plaintiffs' claim that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2, of the Voting Rights Act, 42 U.S.C. 1973."

Clark v. Roemer, Order, October 19, 1990 (M.D. La. unreported). This decision was appealed by appellants to the Fifth Circuit and docketed under 90-3785. Appellants then filed a petition for a writ of certiorari, before judgment, to this Court. No. 90-898. This petition is pending.

B. The Voting Rights Act Section 5 Claim

The appellants also asserted in their Complaint and amendments thereto that certain Louisiana statutory provisions creating additional judgeships had not been precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act. Although the lawsuit was filed in 1986, for four years the only action taken by appellants regarding the Section 5 claims was to convene a three-judge court, which action occurred two years after filing of the Complaint.[3] In July, 1990, four years after filing of the Complaint, the appellants moved to submit the Section 5 claims to a three-judge court. The court was

[3] At that time the three-judge court enjoined five pending judicial elections provided for under Louisiana Acts 1987, No. 801. Three of those judgeships continue to be subject to that injunction.

composed of Circuit Judge Davis, Chief Judge Parker,[4] and Judge Polozola.

Well over fifty pleadings and copious memoranda were submitted to the three-judge court. On October 22, 1990, the three-judge court held its second of two hearings concerning whether to halt the pending 1990 judicial elections. In an order issued that day, October 22, 1990, App. 68a, and in an opinion issued October 31, 1990, the three-judge court ruled that the elections would go forward, App. 1a.

The order and opinion addressed elections to be held under four different categories of statutes. First, elections for judgeships previously precleared or which did not require preclearance would take place. Opinion of the Three-Judge Court (October 31, 1990), App. 12a-13a. Second, the three-judge court held that a number of statutes creating judicial positions had been precleared, ruling "that when 'the Attorney General cleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in the district.' " Opinion of the Three-Judge Court (October 31, 1990), App. 13a. Third, the three-judge court allowed elections to proceed for certain other judgeships which had not been precleared but for which the three-judge court had allowed qualifying and campaigning. Opinion of the Three-Judge Court (October 31, 1990), App. 14a-15a. Judges elected to these

[4] Chief Judge Parker has presided over the district court proceeding during the entire history of this case, including two lengthy trials.

positions would serve provisionally pending further orders of the three-judge court. Opinion of the Three-Judge Court (October 31, 1990), App. 15a-16a. Finally, the three-judge court enjoined certain other elections for which the three-judge court had not permitted qualifying to reopen since the qualification had originally occurred more than two years before. Opinion of the Three-Judge Court (October 31, 1990), App. 17a n. 24. The three-judge court held that within ninety days the State of Louisiana must either obtain preclearance of the unprecleared judgeships or file a declaratory action with the United States District Court for the District of Columbia under the provisions of 28 U.S.C. § 1973c, failing which the judges provisionally elected would be automatically removed from office. Opinion of the Three-Judge Court (October 31, 1990), App. 16a-17a.

On October 29, 1990, appellants filed an application for injunction pending appeal to this Court. On November 2, 1990, this Court enjoined the elections which, the three-judge court held, had not been precleared. *Clark v. Roemer*, 59 U.S.L.W. 3361 (U.S. Nov. 13, 1990). The injunction was conditioned upon timely filing of a jurisdictional statement in this Court. This Court refused to overturn the three-judge court's order holding that approval of later statutes increasing the number of judges necessarily precleared earlier statutes that involved the number of judges. This Court also refused to remove the judges who were either elected on October 6, 1990, or who had not drawn opposition for the October 6, 1990 election.

ARGUMENT

I. WHETHER THE THREE-JUDGE COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD UNDER UNPRECLEARED STATUTES IS NOW MOOT.

Appellants first argue that the three-judge court erred in allowing November 6 and December 8, 1990 elections to be scheduled for positions which the three-judge court held had not been precleared. Appellees believe that the three-judge court correctly balanced the "interest of state and local authorities in managing their own affairs consistent with the Constitution" with the voting rights of the appellants. *See Spallone v. United States*, 493 U.S. ___, ___, 100 S.Ct. 625, 107 L.Ed.2d 644, 655 (1990), *quoting Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 53 L.Ed.2d 745, 756 (1977). Ample precedent for allowing the elections to take place existed under such precedents as *Brooks v. State Board of Elections*, No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), *modified*, (S.D. Ga. May 29 and June 25, 1990) (three-judge court), *aff'd mem.*, Nos. 90-272 & 90-332, 59 U.S.L.W. 3293 (U.S. Oct. 15, 1990); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 167, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985); *Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978); *United States v. County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala. 1977), *aff'd mem.*, 430 U.S. 924, 97 S.Ct. 1540, 51 L.Ed.2d 768 (1977); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *Scaggs v. Larsen*, 396 U.S. 1206, 90 S.Ct. 5, 24 L.Ed.2d 28 (1969); *Moore v. Leflore County Board of Election Commissioners*, 351 F. Supp. 848 (N.D. Miss.

1971); *Wilson v. North Carolina State Board of Elections*, 317 F. Supp. 1299 (M.D.N.C. 1970).

Despite such precedents, this Court enjoined the November 6 and December 8, 1990 elections for these unprecleared judgeships. Both dates have now passed without the elections taking place. Louisiana will be timely filing a declaratory action with the United States District Court for the District of Columbia under the provisions of 28 U.S.C. § 1973c. Consequently, although the State of Louisiana disagrees with this Court's reversal of the three-judge court order allowing these elections in the Fall of last year, the question is now moot.

II. THE THREE-JUDGE COURT CORRECTLY RULED THAT PRECLEARANCE OF STATUTES CREATING AN ULTIMATE NUMBER OF JUDICIAL SEATS IN A PARTICULAR JUDICIAL DISTRICT CONSTITUTES PRECLEARANCE OF ALL JUDICIAL SEATS NECESSARY TO REACH THAT ULTIMATE NUMBER.

The three-judge court correctly concluded that a number of additional judgeships were precleared because the Justice Department had precleared statutes for an ultimate number of judges that necessarily included those additional judgeships. An example of this situation is Caddo Parish, the First Judicial District, where the following pattern occurred:

DIVISION	ADDED	PRECLEARANCE REQUESTED[5]	GRANTED[6]	DENIED[7]
A		NO		
B		NO		
C		NO		
D		NO		
E	Act 2 of 1966	YES	8/18/86	
F	Act 117 of 1973	YES		9/23/88
G	Act 46 of 1976	YES	8/11/76	
H	Act 39 of 1978	YES	9/20/78	
I	Act 21 of 1982	YES	12/2/82	

The three-judge court deemed it nonsensical that adding Judge No. 5 ("E") to the first four judges was permissible, and likewise adding Judges No. 7, No. 8, and No. 9 ("G, H, and I") to the existing judgeships was permissible, but that somehow adding Judge 6 (Division "F") to Judges 1, 2, 3, 4 and 5 was objectionable. The three-judge court held as follows:

> We find that when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district. . . . We reach this conclusion because each of the Acts of the legislature

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[5] Acts 1956, Ex. Sess. No. 7, § 1, in amending former R.S. 13:621, provided that the First Judicial District should have four judges. This Act thus predated the 1965 Voting Rights Act.

[6] The preclearance letters by the U.S. Department of Justice are reproduced and as such appear in the Appendix to this Motion pages 1 through 7.

[7] This letter is reproduced beginning at App. 108a.

which added a new division in Caddo Parish provided that the Act increased the number of judges in the district from an existing number to a new number. When the Attorney General precleared seven judicial positions in Caddo Parish at the time Division G was added, he thereby expressly approved the first six positions, which included Division F. Contrary to plaintiffs' argument, we find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990, order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance, support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

In determining whether the preclearance sought by the State of Louisiana was proper within the meaning of Section 5 of the Voting Rights Act of 1965, the Court must determine whether the submission was in an "unambiguous and recordable manner" and whether the submission was "in fact evaluated" by the Attorney General. The Court finds that the evidence presented in this case does show that the submissions were made to the Attorney General in an unambiguous manner, and he approved the various increases in the number of judges to be added to each of the districts set forth in Part I of our October 22 order.

Opinion of the Three-Judge Court (October 31, 1990), App. 24a – 29a.

The inconsistencies in the approach by the Justice Department were not limited to the First Judicial District. Other examples are listed below:

> Sixteenth Judicial District – After approving and preclearing judgeships for Divisions "E", created in 1977, the Justice Department objected to a judgeship for Division "D" 13 years earlier.
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> Twenty-First Judicial District – After approving and preclearing a judgeship for Division "E", the Justice Department objected to a judgeship created for Division "D" 16 years earlier.
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> Twenty-Third Judicial District – After approving and preclearing a judgeship for Division "D", the Justice Department objected to a judgeship created for Division "C" 22 years earlier.
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> Twenty-Seventh Judicial District – After approving and preclearing a judgeship for Division "D", the Justice Department objected to a judgeship created for Division "C" 19 years earlier.
>
> Twenty-Ninth Judicial District – After approving and preclearing a judgeship for Divisions "D" and "E", the Justice Department objected to a judgeship created for Division "C" 20 years earlier.
>
> Thirty-Ninth Judicial District – After approving a Special Election for a judge, the Justice Department objected 11 years later to the boundaries within which this judge was to sit.

After considering these and many other anomalies, and after reviewing the Louisiana statutes and the

submission letters, the three-judge court concluded that all of these seats had been precleared.[8]

The eminent good sense of the three-judge court's decision is demonstrated by the absurdity of the alternative. Take for example the Twenty-Third Judicial District. Judgeships "A" and "B" predated the Voting Rights Act of 1965, so that no preclearance was required. Judgeship "C" was added by Acts 1968, No. 464. Preclearance was not sought until 1988, at which time preclearance was rejected. Letter of September 23, 1988, Appendix 108a. Judgeship "D" was added by Acts 1982, No. 21, for which preclearance was sought and was received on December 2, 1982. If the Justice Department is right, there cannot be four judges in the Twenty-Third Judicial District because preclearance of the third judge never occurred. Additionally, arguably there cannot be three judges in the

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[8] Significantly, substantially all of the latest Acts were submitted to and approved by the Justice Department. However, after the filing of this litigation, the Justice Department reversed its attitude and policies, and in doing so, refused to preclear any new statutes and refused to preclear Acts passed as long as 20 years ago. In its October 31, 1990 Opinion, the Three-Judge Court stated:

> The evidence submitted by the parties indicates that the Attorney General approved the method Louisiana used for adding judges approximately 81 times. Preclearance was denied on only three dates: September 23, 1988; May 12, 1989; and September 17, 1990. These denials came after Judge Parker had rendered his decision in the Section 2 case on August 15, 1988.

Opinion of the Three-Judge Court (October 31, 1990), App. 29a n. 41.

Twenty-Third Judicial District because the Justice Department has refused to preclear having three judges in the Twenty-Third Judicial District. Thus, there can only be two judges in the Twenty-Third Judicial District, one-half the number which Louisiana needs.[9]

The appellants cite *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed.2d 271 (1984), for the proposition that preclearance of subsequent additional judgeships does not constitute preclearance of an earlier additional judgeship.[10] *McCain*, however, is inapplicable because

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[9] Indeed, according to the Justice Department's "logic," arguably the answer is that there can be *no* judges in the Twenty-Third Judicial District. As the Justice Department approved having four judges in that district, having only two judges would be a change from what has been precleared, which change would itself require preclearance. Given that the Justice Department has refused for the past two years to preclear *any* additional judgeship in Louisiana unless the district involved is majority black (such as Orleans) or unless a black happens to win the seat involved, *see* pages 19-20 *infra*, presumably the Justice Department would not preclear having one or two judges in that district, so there would be *no* judges in the Twenty-Third Judicial District.

[10] Appellants also cite this Court's summary affirmance of *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem. Martin v. Haith*, 477 U.S. 901, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986). Of course, a summary affirmance is "not of the same precedential value as would be an opinion of the court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662, 677 (1974); *accord, Tully v. Griffin*, 429 U.S. 68, 74, 97 S.Ct. 219, 50 L.Ed.2d 227, 233 (1976); *Richardson v. Ramirez*, 418 U.S. 24, 83 n. 27, 94 S.Ct. 2655, 41 L.Ed.2d 551, 587 n. 27 (1974) (Marshall, Douglas, & Brennan, J., dissenting). This Court in *Haith* never addressed

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there the earlier, unprecleared change involved a radical alteration of the type of government in a particular county, while the later, precleared change involved an increase in the number of members in the governing body. The South Carolina General Assembly had enacted a 1966 act, totally revising Edgefield County's system of government. 465 U.S. at 239, 104 S.Ct. 1037, 79 L.Ed.2d at 275. The act combined legislative and administrative powers in a brand-new council. Although the council members were required to reside in a particular district, they were elected at-large. The act also provided for two year terms and set forth the method of electing the council chairman. The 1966 act was never precleared. In 1971 the General Assembly passed a new act to increase the number of council members and districts, necessitating new district boundaries. 465 U.S. at 240, 104 S.Ct. 1037, 79 L.Ed.2d at 276. This act was precleared. 465 U.S. at 241, 104 S.Ct. 1037, 79 L.Ed.2d at 276. This Court held that preclearance of the later act did not constitute preclearance of the former act. The Attorney General was

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the argument relied on by the three-judge court in the instant case. Indeed, this argument is never mentioned in the three-judge court opinion in *Haith*. Finally, it should be noted that the three-judge court in the instant case based its decision on a careful analysis of the various acts in question and of the preclearance submission letters sent by the State of Louisiana to the Attorney General. Opinion of the Three-Judge Court (October 31, 1990), App. at 26a – 27a. For that reason the three-judge court concluded "[i]t cannot be said that the submission by the State of Louisiana was ambiguous concerning the scope of the request." Opinion of the Three-Judge Court (October 31, 1990), App. at 26a n. 38.

focusing on the change in boundaries and in the number of seats, not on the dramatic systemic change in the type of government made by the 1966 act. 465 U.S. at 252, 104 S.Ct. 1037, 79 L.Ed.2d at 283. While in *McCain* the unprecleared act in question created a completely new form of government, here the unprecleared acts merely provided for additional judgeships and stated that the total number of judgeships would be the increased number. Any Louisiana statute submitted to the Justice Department necessarily showed the effect of the new judgeship and provided for the total number of judgeships in the judicial district, and the preclearance of the later statute of necessity precleared the earlier added seat.

Appellants, at pages 6-7 of their Jurisdictional Statement, attempt to reurge their Motion before the three-judge court for reconsideration and clarification of the October 22nd Order. For the following reasons given by the three-judge court in its October 31st Opinion, the Motion was denied:

> **IV. PLAINTIFFS' MOTION FOR RECONSIDERATION AND CLARIFICATION**
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> The plaintiffs have filed a motion seeking to have the Court reconsider its October 22 order insofar as it applies to certain judgeships set forth in Part I of the Court's order. In Part I of the order of October 22, the Court set forth those judicial positions which the Court found to have been precleared by the Attorney General. Specifically, plaintiffs ask the Court to review its decision on the following judicial positions: 10th District, Divisions A and B, and 39th District, Division A; all judgeships in the

First Circuit Court of Appeal; and the at-large judgeships in the Second and Third Circuits.[73]

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[73] Plaintiffs also contend that this Court precleared judgeships in the 17th and 32nd judicial districts even though there were no Section 5 objections made on those two districts. Whether there is an objection filed or not, the Court's decision that these judicial positions have been precleared by the Attorney General is correct.

The Court has again reviewed the record and finds that its decision which held that the judicial positions set forth in Part I of its October 22 order have been precleared by the Attorney General is correct for the reasons previously cited in this opinion. We also find that the Attorney General specifically precleared the division of the 10th and 39th Judicial Districts into two separate districts when he approved judicial positions for both districts. Finally, we conclude that when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits.[74]

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[74] The state's six page letter of July 29, 1981, to the Attorney General explained in detail the changes made by Act 3 of 1981. On page 4 of the letter, it is stated: "*Prior law* provided for alphabetical divisions (A, B, C, . . .) within each district of the First Circuit. *New law* provides the same for all court of appeal circuits." (emphasis in original).[11]

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[11] This six page letter dated July 29, 1981 to the U.S. Department of Justice and the August 26, 1981 response thereto by the U.S. Department of Justice are reproduced and appear in the Appendix to this Motion pages 8 through 19.

> The Court on its own motion does find that one judicial position which the Court initially found to be unprecleared has in fact been expressly precleared by the Attorney General. This district is District 20, Division B. Exhibit D-4, which was filed in the record, clearly shows that the split of District 20 into two parishes and the creation of Division B was expressly submitted and approved by the Attorney General. Therefore, the Court hereby amends its October 22 order to delete District 20, Division B from the unprecleared list in Part II of the order. The Court orders this judicial position to be included in Part I of the October 22 order which sets forth precleared judicial positions.

Opinion of the Three-Judge Court (October 31, 1990), App. 50a through 53a.

Appellants also contend that subsequent preclearance in this case is improper because of the possibility of an earlier "stated discriminatory purpose" in one of the prior Louisiana statutes. Of course, here there are no pleadings or evidence in this Section 5 case of any stated discriminatory purpose in the addition of much-needed judgeships in the State of Louisiana. Indeed, the Justice Department has admitted that its objection is "not to the number of judges *per se*", Letter of October 6, 1990, App. 169a, and that it does not question the State of Louisiana's "need for or purpose in creating new judgeship positions." Letter of September 17, 1990, App. 168a.

Instead, the Justice Department has announced that it is opposed to Louisiana's at-large system of electing judges, a system in effect since 1946, *see* LA. R.S. 13:582-585, predating by two decades the Voting Rights Act of 1965. *See Beer v. United States*, 425 U.S. 130, 139, 96

S.Ct. 1357, 47 L.Ed.2d 629, 638 (1976). The Justice Department has been dragging its feet on preclearance requests because it wants to uproot and destroy the entire Louisiana judicial election system, replacing it with another "system" such as limited voting.[12] Letter of September 17, 1990, App. 158a.[13] The Justice Department's heavy-handed action in refusing to preclear additional judgeships so as to attempt to force Louisiana to change its "system" of electing judges ignores the decision in this case that the Louisiana "system" of electing judges cannot violate Section 2 of the Voting Rights Act, ignores the holding in *Thornburg v. Gingles*, 478 U.S. 30, 56, 106 S.Ct. 2752, 92 L.Ed.2d 25, 50 (1986), that any remedy under Section 2 must be district-specific and not systemic,

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[12] Under limited voting a voter can only vote for some of the positions on the ballot. Such a system would itself appear to violate the Voting Rights Act. 42 U.S.C. § 1973n. Limited voting was rejected as a judicial remedy in Voting Rights Act cases, including *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). Judge Parker rejected it as a remedy in this case, after hearing uncontested testimony that it exists in only approximately 200 of the more than 86,000 local governmental units in this country.

[13] The Justice Department cited as authority Judge Parker's statement in his opinion on liability that the solution was to "revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285, 303 (M.D. La. 1988). Judge Parker reversed himself after the remedy trial, holding that the court "lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to the 'guilty' districts." *Clark v. Roemer*, ___ F. Supp. ___ (M.D. La. 1990), not yet reported.

ignores the Fifth Circuit's decision in *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), and violates the Justice Department's internal rule requiring that preclearance determinations be guided by relevant federal judicial decisions. *See* 28 C.F.R. ch. 1 (7-1-89 Edition) § 5.56.

Indeed, if there is any "discriminatory purpose" in this case, it is the "discriminatory purpose" evidenced by the Justice Department in its preclearance decisions involving Louisiana judgeships.[14] In two letters dated the same day the Justice Department stated that portions of Act 8 of 1990 adding judgeships would not be precleared, but other portions of the same statute adding judgeships were precleared. *Compare* Letter of September 17, 1990, App. 142a, 160a, 166a *with* Letter of September 17, 1990, App. 136a. Even stranger is the case of the Sixth Judicial District. In September 1990 the Justice Department refused to preclear an additional judgeship for that judicial district. Letter of September 17, 1990, App. 163a. When an election was held in that district on October 6,

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[14] Appellees filed in the three-judge court a motion challenging the constitutionality of the Justice Department's application of Section 5 to these Louisiana judgeships. The motion states that the Justice Department has precleared every judicial act of Alabama and Texas, while refusing to preclear Louisiana's judicial acts, even though the judicial election systems in the three states are precisely the same: i.e., at-large, designated post, majority vote. On January 10, 1990, Appellees moved that this motion be transferred to the United States District Court for the District of Columbia, pursuant to 28 U.S.C. §§ 1404, 1406, and 1631, as that Court will be hearing the declaratory judgment action concerning preclearance of these Louisiana judgeships.

1990, pursuant to the three-judge court order, a black happened to win the election. Thereafter, on November 20, 1990, the Justice Department precleared the previously unapprovable seat *even though no request for preclearance of that seat was pending*. Letter of November 20, 1990, (included herein as App. 20).

The judgeship involved in the Sixth Circuit was for the Section B judicial position. This judgeship was authorized by Acts 1974, No. 515. This Act contained precisely the same language as that of all other acts of the Legislature creating judgeship positions, i.e. "the (number) judicial district shall have (number) judges." This Act is reproduced, and as such included herein, as App. 22-26. It is difficult to perceive how an individual could serve in this unprecleared judgeship seat for 15 or 16 years, yet the successor in office immediately serves in what is now a precleared judgeship seat. Their constitutional powers were the same — while sitting as a district court they each had exclusive original jurisdiction of all civil and criminal matters. They had exclusive original jurisdiction of felony cases and of cases involving title to immovable property; the right to office or other public position; civil or political rights; probate and succession matters; the state, a political corporation, or political subdivisions, or a succession, as a defendant; and the appointment of receivers or liquidators for corporations or partnerships. Constitution of Louisiana 1974 Art. 5, § 16.

Clearly, the Justice Department does not believe that the addition of vitally needed judgeships in a multi-member judicial district is discriminatory. Instead, the Justice Department disagrees with the Louisiana at-large

system of electing judges (even though the system existed for two decades before the Voting Rights Act of 1965) except, of course, where the at-large system happens to result in the election of minority judges.

Given the absence of any discriminatory purpose and given that a statute providing for eleven judges in a judicial district necessarily means that there are one-two-three-four-five-six-seven-eight-nine-ten-eleven judges in that district,[15] the three-judge court correctly concluded that the statutes at issue had been precleared.

III. JUDGES WHO HAVE BEEN ELECTED SHOULD NOT BE THROWN OUT OF OFFICE

Finally, appellants finally argue that judges who were unopposed and elected or who won in elections held on October 6, 1990, should be thrown out of office. The appellants never sought an injunction to prevent these elections from occurring and should not now be able to retroactively invalidate these elections. Nor have

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[15] For example, Acts 1978, No. 39, amended LA. R.S. 13:621.15 to increase judges in the Fifteenth Judicial District from 6 to 7, and this was precleared on September 20, 1978. Acts 1982, No. 21, amended LA. R.S. 13:621.15 to increase judges in the Fifteenth Judicial District from 9 to 10, and was precleared on December 2, 1982. Acts 1983, No. 226, amended LA. R.S. 13:621.15 to increase judges in the Fifteenth Judicial District from 10 to 11 and this was precleared on October 7, 1983. Yet, after preclearing the change from 6 judges to 7 judges; preclearing the change from 9 judges to 10 judges; and preclearing the change from 10 judges to 11 judges; the Justice Department objected to earlier increases from 4 judges to 5 judges; 5 judges to 6 judges; and 7 judges to 9 judges.

appellants sought relief in the three-judge court as to these judgeships.

This Court in the past has refused to set aside elections held under statutes that had not been precleared, holding that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." *Perkins v. Matthews*, 400 U.S. 379, 396-97, 91 S.Ct. 431, 27 L.Ed.2d 476, 489-90, (1971); *accord, Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978); *Allen v. Board of Elections*, 393 U.S. 544, 571-72, 89 S.Ct. 817, 22 L.Ed.2d 1, 20-21 (1969).[16]

---

[16] One of the factors to be considered in determining whether to invalidate elections is "whether it was reasonably clear at the time of the election that the changes were covered by § 5." *Perkins v. Matthews*, 400 U.S. 379, 396, 91 S.Ct. 431, 27 L.Ed.2d 476, 489 (1971). The United States Court of Appeals for the Fifth Circuit has stated that § 2 of the Voting Rights Act does not apply to the judiciary. *League of United Latin American Citizens Council # 4434 v. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*). The three-judge court held in this case that § 5 of the Voting Rights Act is applicable to certain additional judgeships, but that pending elections for those judgeships should nevertheless go forward. This Court, however, enjoined such elections. The three-judge court in *Hunter v. City of Monroe*, Docket 90-2031 (W.D. La. November 7, 1990, unreported) (three-judge court) held that § 5 of the Voting Rights Act does not apply to the "addition of more judges, to be elected by the same voters who elect the present judges." Opinion of Three-Judge Court, November 7, 1990. *Id.* Slip Opinion p. 3. This Court refused to grant a request by the petitioners in that case to prevent the elected judges from taking their seats. *Hunter v. McKeithen*, (A-363) 59 L.W. 3291 (Nov. 26, 1990). "Given these varying decisions, it cannot be said that the law in this area is "reasonably clear."

In *Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978), an action was filed in a three-judge court shortly before a primary election to enforce the requirements of § 5 and to prevent the pending election. The requests for declaratory and injunctive relief were not acted upon until after the scheduled primary election and the subsequent run-off election. The three-judge court afforded prospective relief only by enjoining further enforcement of the statute but did not set aside the results of the elections. On appeal, this Court refused to void the elections, holding:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election.

438 U.S. at 192-93, 98 S.Ct. 2692, 57 L.Ed.2d 693, 696.

Even more recently, in October, 1990, a three-judge court refused to enjoin plaintiffs' request to enjoin a City Court election in Monroe, Louisiana, based on the failure to obtain preclearance. Docket 90-2031 (W.D. La. November 7, 1990, unreported) (three-judge court). The plaintiffs in that case did not appeal the denial of the injunction to this Court. Instead, two weeks after the election, they filed a Motion for Reconsideration, Certification, and Comprehensive Relief. The three-judge court allowed certification of the winners. Thereafter, the plaintiffs filed an

Application for Stay and Injunction Pending Appeal with this Court, which application sought to prevent the elected judges from taking their seats. No. A-363. Circuit Justice Scalia turned the application over to the entire Court, which denied the request 7-2. *Hunter v. McKeithen*, (A-363) 59 L.W. 3291 (Nov. 26, 1990).

Appellees submit that the decision by this Court in *Hunter* is applicable here. Indeed, the argument against throwing these judges out of office is even stronger because (a) unlike *Hunter*, no injunctive relief was sought in this case until after the election had occurred, and (b) unlike *Hunter*, these judges have already been seated and are acting on a heavy docket of cases.

Counsel for appellants admitted in a hearing in this case before Judge Parker on December 20, 1990, that the *Hunter* precedent governs the judges sought to be unseated here. During that same hearing, counsel for the appellants stated that he would not be seeking in that court to unseat these judges:

> MR. McDUFF: Now, in all candor, with respect to the first category of judgeships that were elected either in July without opposition or on October 6th, the Supreme Court did not specifically enjoin them from taking office in its injunction. And in the *Hunter* case which was a case coming out of Monroe City Court which we asked the Supreme Court to enjoin people from taking office after they had been elected because the timing was such that an application was not made to the Supreme Court for election, and they turned us down on a seven to two vote.
>
> So, to me that means that the Supreme Court did not specifically, in this case, enjoin the people elected in July through qualification or October 6th from taking office. So we are not going to take the position in this court that they should be kept from taking office. We do think, of course, it is still an unprecleared judgeship and that eventually something further is going to happen with it.

Transcript of Hearing in *Clark v. Roemer*, December 20, 1988, page 11, lines 22-25, page 12, lines 1-13.

Appellees note that the United States Attorney General has taken the position that these judges should be permitted to take office on a provisional basis. These same appellants sought on December 27, 1990, in the district court to enjoin certain incumbent Louisiana state district judges from serving in office past January 1, 1991, thus attempting to deprive the State of Louisiana of some of its existing judgeships. In the Response of the United States to Plaintiffs' Motion to Prevent Certain Persons From Holding Over in Office, filed on January 4, 1991, the United States Attorney General argued against throwing these judges out of office, stating:

> Movants here have not pointed to any reason why those incumbent judges elected prior to the 1990 election cycle should be treated differently from those judges elected as a result of the October 1990 elections and who will be permitted to take office on a provisional basis consistent with this Court's prior orders.

On January 11, 1991, the three-judge court agreed with this analysis by the United States Attorney General, and, in so doing, issued the following Amended Order:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANICE CLARK, ET AL

VERSUS CIVIL ACTION

CHARLES E. ROEMER, ET AL NO. 86-435-A

AMENDED ORDER

The court has pending before it a motion on behalf of plaintiffs to prevent certain state judges from continuing in office and to prevent the state from otherwise filling those offices. The state judgeships involved are among those the creation of which have not been "precleared" by the Attorney General of the United States as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1965, 42 U.S.C. § 1973c, and they are listed in Part II of this court's order dated October 22, 1990. The specific judgeships which are the object of the motion are Division G of the Fourth Judicial District, Morehouse and Ouachita Parishes, and Divisions E, F and G of the Fourteenth Judicial District, Calcasieu Parish.

The court's order of October 22, 1990 scheduled elections for those judgeships (among others) for November 6, 1990 and if runoffs were required, for December 8, 1990 and the order authorized those persons elected to take office and serve provisionally as is set forth in Part III of the order. The Supreme Court, by its orders of November 2 and 5, 1990, set aside that portion of this court's order which authorized elections for judgeships which have not been precleared and enjoined the state officials from conducting those elections.

Because the scheduled elections were enjoined, no person was elected to any of those

judgeships and plaintiffs seek to enjoin the state from allowing those offices to be filled until the state has complied with the provisions of Section 5.

At present three of those offices are filled by incumbent judges whose terms expired on December 31, 1990. The other position has been filled by appointment by the Supreme Court of Louisiana under state law.

While the October 22, 1990 order may not authorize provisional filling of these specific judgeships, the spirit of the order is to avoid disruption of Louisiana's judiciary to the extent possible until the preclearance issues are finally resolved. All of these judgeships were created and filled years ago. While one does not have an incumbent because of the retirement of the incumbent, each is an integral part of Louisiana's existing judicial system. Their loss would impinge upon that system.

While the State defendants have not moved for amendment of the earlier order, the court sua sponte will amend it.

Accordingly, IT IS ORDERED that the order of October 22, 1990 is hereby amended so as to allow Division G of the Fourth Judicial District and Divisions E, F and G of the Fourteenth Judicial District to be provisionally filled in accordance with and under the terms and restrictions of Part III of that order.

Baton Rouge, Louisiana, January 11, 1991.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT
JUDGE

/s/ John V. Parker
JOHN V. PARKER
UNITED STATES DISTRICT
JUDGE

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT
JUDGE

Appellants conclude their Jurisdictional Statement by stating, "In the meantime, of course, the State of Louisiana remains free to pass and preclear legislation that would cause these judges to be elected in a manner that satisfies Section 5." Presumably, by this, appellants mean that the State of Louisiana should adopt a new system of electing judges, such as limited voting. The problems with limited voting have been previously discussed in this motion.[17] Further, most of the unprecleared judgeships involve one seat in a district, and there is no way to have limited voting for one judgeship. Under limited voting, voters vote for some but not all of the positions to be filled. Where there is only one position to fill, there is no way to limit the voting population. Single judgeships are single offices, and the Voting Rights Act has been held not to apply to single office holders. *See Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986); *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620, 645 (5th Cir. 1990) (*en banc*) (Higginbotham, J., concurring).

CONCLUSION

Louisiana has embraced, by direct will of its people as reflected through the framing and adoption of its

[17] *See* footnote 12 *supra*.

Constitutions, an electoral judicial system during 135 of its 179 year history, which includes a period of time in excess of all of this century and over a third of the last century.

Louisiana, unlike most of the 42 other states with an electoral judicial section, or retention system, may not freely make adjustments to Louisiana's judicial system without advance approval from Washington. In days gone past, such approval was never unreasonably withheld. On 81 such previous occasions, as found by the three-judge court [*see* page 12, fn. 8 *supra*] approval of a Louisiana legislative act was virtually automatic. From the day [August 15, 1988] Chief Judge Parker spoke of a systemic remedy [as subsequently recanted by Chief Judge Parker], the Justice Department of the United States has drawn a line in the sand, and, in so doing, has insisted on Louisiana adopting either a limited voting scheme or a cumulative voting scheme. As previously reflected [page 19 fn. 14 *supra*] Louisiana firmly believes that Section 5 is unconstitutional as currently applied by the Justice Department of the United States. This and many other issues, including the proper relationship between Sections 2 and 5 of the Voting Rights Act, are not presented in this case.

Until these difficult questions have been entertained and considered by the district court in the District of Columbia (as will occur in this case under the Three-Judge Court Order of October 22, 1990) and there is available to this Court a fully developed record, the present consideration of Section 5 is unwise and premature. Appellees, therefore, urge this Court to dismiss this appeal or, in the alternative, to affirm the decision of the three-judge court below.

All of the above and foregoing is thus respectfully submitted.

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Attorneys for and on behalf of Charles "Buddy" Roemer Governor of Louisiana

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Attorney for and on Behalf of Fox McKeithen Secretary of State of Louisiana

APPENDIX

SEAL U.S. Department of Justice

WBR:SSC:DHH:jmc:gmh
DJ 166-012-3
P8184-8187
P8735
P8994-9002

Washington, D.C. 20530

August 18, 1986

L. Adrienne Dupont, Esq.
Staff Attorney
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804-9005

Dear Ms. Dupont:

This is in reference to four acts of the Louisiana Legislature creating judgeships (Act No. 3 (1965) – District 9, Division C; District 19, Division F; District 21, Division C; District 24, Divisions F and G; Act No. 2 (1966) – District 1, Division E; District 15, Division D; District 19, Division G; Civil District Court, Orleans Parish, Division I; Act No. 216 (1970) – District 19, Divisions H, I, and J; and Act No. 5 (1972) – District 19, Division K) and to the procedures for conducting the September 27, 1986, special election and the November 4, 1986, runoff election to fill a vacancy for a judgeship (District 19, Division H), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission of the additional judgeships on July 23, 1986, and your submission of the special elections on July 28, 1986. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.42 and 51.48.

Because these submissions are related to matters before the court in *Clark v. Edwards*, C.A. No. 86-435 Sec. A (M.D. La.), we are taking the liberty of sending a copy of this letter to the court.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Sandra Coleman
for Gerald W. Jones
Chief, Voting Section

cc: C. Lee Dupuis, Esq.
Clerk, United States District Court
for the Middle District of Louisiana

Ernest L. Johnson, Esq.
Johnson, Taylor & Thomas

Samuel Issacharoff, Esq.
Lawyers' Committee for Civil
Rights Under Law

Department of Justice
Washington, D.C. 20530

AUG 11 1976

Mr. Kenneth C. DeJean
Assistant Attorney General
Department of Justice
Post Office Box 44005
State Capitol
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to the changes affecting judicial districts by Act No. 46 and Act No. 47 of the 1976 Regular Session of the Louisiana Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965 as amended. Your submission was received on July 12, 1976. In accordance with your request, expedited consideration has been given this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. Section 51.22).

The Attorney General does not interpose any objection to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. We should further point out that the Attorney General has no authority to waive the 60-day period for considering a submission and, as our guidelines indicate (see 28 C.F.R. Section 51.22), we may re-examine our position on your submission should we receive additional information concerning the changes in voting procedure prior to

the expiration of the 60-day period. Should such information warrant a change in the Attorney General's determination, you will be so advised.

Sincerely,

/s/ J. Stanley Pottinger
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 50530

SEAL

DSD:DHH:ELG:gml
DJ 166-012-3
A7300

Mr. Kenneth DeJean
Assistant Attorney General
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 39 of the 1978 Regular Session of the Legislature of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on July 26, 1978.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By: /s/ Gerald W. Jones
GERALD W. JONES
Chief, Voting Section

SEAL

U.S. Department of Justice

WBR:CWG:TGL:dvs
DJ 166-012-3 Washington, D.C. 20530
G5606-5607
G7029-7030

Honorable William J. Guste, Jr.
Attorney General
State of Louisiana 2 DEC 1982
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. Attorney General:

This is in reference to Act No. 21 (1982), of the Regular Session of the Louisiana Legislature, which creates additional district court judgeships for Judicial District Nos. 1, 15, 18, 23 and 27, divides the 29th Judicial District so as to create the 40th Judicial District, provides for the election of a district attorney in the 40th Judicial District and provides for the January 15, 1983, special election to be held in that district in the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on October 5, 1982.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Calvin Gabil
Gerald W. Jones
Chief, Voting Section

SEAL

WILLIAM J. GUSTE JR
ATTORNEY GENERAL

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

July 29, 1981

CERTIFIED – RETURN RECEIPT
REQUESTED – #P05 8840222

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
Voting Rights Section
Department of Justice
Washington, D. C. 20530

RE: Submission of Act 3 of 1981 under
Section 5 of Voting Rights Act

Dear Mr. Turner:

The State of Louisiana, through its Attorney General, William J. Guste, Jr., hereby submits Act 3 of the Regular Session of the Louisiana Legislature of 1981, a duly certified copy of which is attached hereto.

---

[1] Mr. James P. Turner, July 29, 1981, with sequential page numbers, i.e. two, three, four, five, and six have been omitted from this copy.

This Act is submitted pursuant to the Voting Rights Act of 1965, Section 5, and in accordance with 28 C.F.R., Part 51, as this Act effects changes with respect to voting in the State of Louisiana by amending and reenacting certain portions of the Louisiana Revised Statutes. Those sections are: R.S. 13:312, R.S. 13:312.1, R.S. 13:321, and R.S. 13:353.

Act 3 was originally introduced in the Louisiana Senate as Senate Bill 170. The purpose of the bill is to assist in facilitating changes in appellate jurisdiction of the Louisiana Supreme Court and the Louisiana Circuit Courts of Appeal. Prior to 1980, the Louisiana Courts of Appeal had no criminal jurisdiction. However, by reason of Act 843 of 1980, approved by the Louisiana electorate on November 4, 1980, as an amendment to the Louisiana Constitution, effective July 1, 1982 appellate jurisdiction in criminal matters will be vested in the Louisiana Courts of Appeal. With the change in the appellate jurisdiction of the Courts of Appeal, the Legislature recognized the need for additional judgeships to handle the additional criminal appeal workload that these courts will assume and accordingly, Act 3 made the following changes:

New law, relative to the courts of appeal, basically provides for the creation of a Fifth Circuit, out of the present Fourth Circuit, and also increases the number of appellate judges from 33 to *48* throughout the state.

New law creates the court of appeals for the Fifth Circuit out of the present Fourth Circuit. The chart below shows the number of judges and arrangement of districts in the prior law, Act 661 of 1980, and the new law to wit:

	PRIOR LAW		ACT 661, 1980 R.S.		NEW LAW	
1.	First Circuit					
	Districts	Judges	Districts	Judges	Districts	Judges
1st -	Ascension, Assumption, Iberville, Lafourche, Pointe Coupe, St. Mary, Terrebonne, and West Baton Rouge	3	1st - (Same)	3	1st - (Same)	4
2nd -	East Baton Rouge	3	2nd - (Same)	3	2nd - (Same)	4
3rd -	East Feliciana, Livingston, St. Helena, St. Tammany, Tangipahoa, Washington, and West Feliciana	3	3rd - (same) At Large	3 1	3rd - (Same)	4
Total		9	Total	10	Total	12

	PRIOR LAW		ACT 661, 1980 R.S.		NEW LAW	
2.	Second Circuit					
	Districts					
1st -	East Carroll, Franklin, Madison, Morehouse, Ouachita, Richland, Tensas, and West Carroll	1	1st - (Same)	1	1st - (Same)	2
2nd -	Bienville, Bossier, Caldwell, Claiborne, Jackson, Lincoln, Union, Webster, and Winn	1	2nd - (Same)	1	2nd - (Same)	2
3rd -	Caddo, DeSoto, and Red River	1	3rd - (Same)	1	3rd - (Same)	2
At Large		2	At Large	3	At Large	1
Total		5	Total	6	Total	7

	PRIOR LAW	ACT 661, 1980 R.S.	NEW LAW
3.	Third Circuit (No Change by new law)		
	Districts		
1st -	Avoyelles, Catahoula, Concordia, Grant, LaSalle, Natchitoches, Rapides, and Sabine 2	1st - (Same) 2	1st - (Same) 2
2nd -	Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vernon 2	2nd - (Same) 2	2nd - (Same) 2
3rd -	Acadia, Evangeline, Iberia, Lafayette, St. Martin, St. Landry, and Vermilion 2	3rd - (Same) 2	3rd - (Same) 2
At Large	 3	At Large 3	At Large 3
Total	 9	Total 9	Total 9

App. 12

	PRIOR LAW	ACT 661, 1980 R.S.	NEW LAW
4.	Fourth Circuit		
	Districts		
1st -	Jefferson 2	1st - Orleans 8	1st - Orleans 8
2nd -	Orleans 5	2nd - Plaquemines.. 1	2nd - Plaquemines.. 1
3rd -	St. Charles, St. James, St. John the Baptist 1	3rd - St. Bernard ... 1	3rd - St. Bernard ... 1
4th -	Plaquemines and St. Bernard... 1		
From combined 1st, 3rd, and 4th districts	 1		
Total	10	Total 10	Total 12

App. 13

PRIOR LAW		ACT 661, 1980 R.S.	NEW LAW	
5.	Fifth Circuit (New)			
	1st - Jefferson	1	1st - (Same)	6 (7)
	2nd - St. James, St. John the Baptist (east of the Mississippi)	1	2nd - (Same)	1
	3rd - St. Charles, St. John the Baptist (west of the Mississippi)	1	3rd - (Same)	1
	Total	6	Total	8 (9)
	TOTAL	41	TOTAL	48 (49)
	TOTAL	33	TOTAL	48 (49)

An additional judge for the first district exists until January 1, 1983.

Act 661 of 1980 would create the additional judgeships shown on the chart effective December 1, 1981.

New law repeals the above digested provisions of Act 661 which are to be effective December 1, 1981, except that it retains the provisions of Act 661 which created one additional judgeship for the Fourth Circuit. That judgeship has been filled. (Effective on signature of the governor).

Prior law provided that a sheriff's deputy shall attend each session of court for the First, Second, and Third Circuits. The Fourth Circuit is attended by the New Orleans police. *New law* adds sheriffs' deputies for the Fifth Circuit. (Effective May 1, 1982).

New law provides that all additional judgeships shall be established as soon as this Act is signed by the governor. Provides for a special election by special primary on the third Saturday in October and special general election on the sixth Saturday following the third Saturday in October. The new judges for the First, Second, and Fourth Circuit take office on January 1, 1982; the judges for the Fifth Circuit take office May 1, 1982. The new judges for the "new" Fourth Circuit will be elected to districts of the "old" Fourth Circuit, take office on January 1, 1982, and be transferred to the "new" Fourth Circuit on May 1, 1982.

Provides that nine judgeships shall be established for the Fifth Circuit until January 1, 1983. Provides that seven of the judges shall be elected from the first district of the Fifth Circuit. Provides that one judgeship from the first district shall be abolished on January 1, 1983 (when the

incumbent judge's term expires). Provides that four of the nine judges are incumbent judges, the remaining five additional judges shall be selected as follows: one from the third district, and four from the first district of the Fifth Circuit.

Prior law provided for alphabetical divisions (A, B, C, ...) within each district of the First Circuit. *New law* provides the same for all court of appeal circuits. (Effective on the signature of the governor).

Effective dates
(a) On Act's signature by governor – establishment of all judgeships.
(b) May 1, 1982 – creation of the Fifth Circuit.
(c) On signature of the governor – all other provisions.

Act 3 was adopted by the Louisiana Legislature pursuant to its general legislative powers provided in Article III, Section 1 of the Louisiana Constitution of 1974 and the Constitution of the United States of America, Amendment X.

Act 3 was finally passed by the Legislature on May 27, 1981, when the Louisiana Senate concurred in House amendments by a vote of 33-0. The House of Representatives had previously adopted the bill by a vote of 77-1 on May 2, 1981. The Act was signed by Governor David C. Treen on June 2, 1981.

Section 13 of the Act provides with respect to the effective date of the various sections of Act 3. In accordance with the mandate of Act 3, Governor Treen has issued an Executive Proclamation calling for elections to fill the newly created judgeships which are scheduled to

be conducted on October 17, 1981 and November 28, 1981 for the primary and general elections, respectively. A copy of this proclamation is enclosed. Due to these impending elections, the State of Louisiana requests expedited consideration.

The Act will be effective with respect to only those portions of the State of Louisiana where additional Court of Appeal judgeships have been created, and it is not anticipated that the Act will affect adversely any language or racial minority group.

An action entitled *Elmer Tapper v. David C. Treen, Governor of Louisiana,* was filed in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, relative to the implementation of Act 3. A copy of the Plaintiff's petition is included, although Mr. Trapper has voluntarily dismissed his petition as of July 22, 1981. The prior practices were precleared by the United States Attorney General in a letter dated August 28, 1980, a copy of which is attached hereto.

Requests for further information should be directed to the undersigned, Kenneth C. DeJean, Assistant Attorney General, Post Office Box 44005, Baton Rouge, Louisiana 70804, telephone: (504) 342-7013.

Sincerely,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Kenneth C. DeJean
KENNETH C. DEJEAN
Assistant Attorney General

KCD:lg
Enclosures (4)

SEAL
WBR:CWG:TGL:gml
DJ 166-012-3 *Washington, D.C. 20530*
D9992-9993

Kenneth C. DeJean, Esq.
Assistant Attorney General
State of Louisiana Aug 26, 1981
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 3 of the 1981 Regular Session of the Louisiana Legislature, which provides additional appellate court judges and a special election in October 1981, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on August 4, 1981. In accordance with your request expedited consideration has been given this submission pursuant to Section 51.32 of the Procedures for the Administration of Section 5 (46 Fed. Reg. 877).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the

Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Calvin Gabil
Gerald W. Jones
Chief, Voting Section

SEAL

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Nov. 20, 1990

Dear Ms. Rougeou:

This refers to the September 23, 1988, objection, under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Act 515 (1974), which creates an additional judgeship (Division B) and provides for a special election therefor in the 6th Judicial District of the State of Louisiana.

As you know, on September 17, 1990, the Attorney General declined to withdraw the objection, based on the information that was then available. Since that time, we have received and carefully reviewed additional factual information relevant to the creation and implementation of the Division B judgeship position. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.46). More specifically, our analysis of the October 6, 1990, election returns has led us to further reconsider our determination with regard to the 6th Judicial District, and, based on that reconsideration we are satisfied that the concerns we previously entertained no longer prevail in that district. Accordingly, the objection interposed September 23, 1988, and continued September 17, 1990, to the specified changes under Act 515 (1974) is hereby withdrawn. See 28 C.F.R. 51.48 and 51.55. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act

expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. 28 C.F.R. 51.41.

Because this matter remains pending before the court in *Clark v. Roemer*, No. 86-435-A (M.D. La.), we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

Michael M. Rubin, Esq.
Fred J. Cassibry, Esq.
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Robert B. McDuff, Esq.
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ACT 515

Regular Session, 1974

SENATE BILL NO. 202

BY MR. C. M. BROWN

ORIGINATED

IN THE

SENATE

/s/ Charles Wm. Roberts
SECRETARY OF THE
SENATE

Rec'd by the Governor
July 11, 1974 at 11:45 PM
D. Davenport

Received by Secretary of State
the 13th day of July, 1974
/s/ Wade O. Martin, Jr.
Secretary of State

Certified by the Governor as
Emergency Legislation.

H 7/9/74, S 7/9/74
date

Wade O. Martin, Jr.
Secretary of State

AN ACT

To amend and reenact Sections 621.5, 621.9 and 621.32 of Title 13 of the Louisiana Revised Statutes of 1950, relative to the number of judges in

the Sixth, Ninth and Thirty-Second Judicial Districts, to create an additional office of district judge for each of said judicial districts; to provide for the qualifications, election, term of office, compensation and expenses of said additional judges, including the election of the initial judges; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Sections 621.6, 621.9 and 621.32 of Title 13 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted to read as follows:

§ 621.6. Sixth judicial district

The sixth judicial district court shall have two judges.

* * *

§ 621.9. Ninth Judicial District

The Ninth Judicial District Court shall have five judges.

* * *

§ 621.32. Thirty-Second judicial district

The thirty-second judicial district shall have four judges.

Section 2. For purposes of nomination and election only there is created in the sixth judicial district two divisions, to be designated as Division A and Division B. Division A shall be occupied by the present judge of the sixth judicial district court and his successors in office, and Division B shall be occupied by the first person to

serve as judge of the herein newly created judgeship and his successors in office.

Section 3. There is created in the thirty-second judicial district one new division, to be known as Division O. The divisions of the thirty-second judicial district which are already existing on the effective date of this Act shall be occupied by the present judges and their successors in office and Division O shall be occupied by the first person elected to serve as judge of the herein newly created judgeship and his successors in office. The creation of this division is for the purpose of nomination and election only.

Section 4. The additional judges provided for by this Act for the sixth and thirty-second judicial districts shall have the same qualifications and shall be elected at the same time and in the same manner, shall serve the same term of office and shall be entitled to the same compensation and expenses, payable from the same sources, as is now or may hereafter by provided for the other judges of the sixth and thirty-second judicial districts.

The first occupant of the additional judgeship provided for by this Act shall be elected at a special election which shall be called by the governor for the first term, and the judge so elected shall serve a term to expire at the same time as the term of the other judge of the sixth judicial district.

The first judge to fill the additional judgeship of the thirty-second judicial district herein created shall be elected at a special election to be called by the governor to be held at the same time as the congressional elections in 1974.

Section 5. There is created in the Ninth Judicial District one new division, to be known as Division E. The divisions of the Ninth Judicial District which are already existing on the effective date of this Act shall be occupied by the present judges and their successors in office. Division E shall be occupied by the first person elected to serve as judge of the herein newly created judgeship and his successors in office. The creation of this division is for the purpose of nomination and election only.

Section 6. The additional judge provided for by this Act shall have the same qualifications and shall be entitled to the same compensation and expenses, payable from the same sources as is now or may hereafter be provided for the other judges of the Ninth Judicial District Court, and shall be elected by the qualified voters of the said judicial district at a special election to be called by the governor to be held on the first Tuesday after the first Monday in November, 1974, for a term ending with the term of the present district judges in said judicial district, and thereafter the said judge shall be elected at the same time and in the same manner and shall serve the same term of office, as is now or may hereafter be provided for the other judges of the Ninth Judicial District Court.

Section 7. The legislature has knowledge of the fact that more than one bill has been introduced and/or passed at this 1974 Regular Session, each of which increases the number of district judges, and the legislature hereby declares its intent that each such bill enacted at this session creating any new judgeship in a judicial district is not intended to repeal or conflict with another bill enacted at this session creating any judgeship in another

district, and that it is the intent of the legislature that any such bills enacted at this session, whether enacted prior to or after the enactment of this Senate Bill No. 202, shall be construed in harmony to give each bill effect in the judicial district in which it increases the number of judges.

Section 8. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby decalred (sic) severable.

Section 9. All laws or parts of laws in conflict herewith are hereby repealed.

/s/ James E. Fitzmorris, Jr.
LIEUTENANT GOVERNOR
AND PRESIDENT OF THE
SENATE

/s/ E.L. Henry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

/s/ Edwin Edwards
GOVERNOR OF THE STATE
OF LOUISIANA

APPROVED: July 12, 1974

E at 3:15PM

FILED
MAR 4 1991
OFFICE OF THE CLERK

(3)

No. 90-952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of Louisiana

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED DECEMBER 14, 1991
PROBABLE JURISDICTION NOTED JANUARY 18, 1991

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RELEVANT DOCKET ENTRIES

July 1, 1986 --

Complaint filed.

July 30, 1987 --

Fourth Supplemental and Amended Complaint filed.

July 28, 1988 --

Plaintiffs' Section 5 motion to the three-judge district court for injunction against the fall, 1988 elections for unprecleared judgeships filed.

August 15, 1988 --

Single-judge district court issued findings of liability under Section 2 of the Voting Rights Act.

August 29, 1988 --

Three-judge district court enjoined the state defendants from conducting

the fall, 1988 elections for unprecleared judgeships, but permitted the printing and delivery of ballots in the event Section 5 clearance was obtained prior to the election.

September 27, 1988 --

Three-judge district court enjoined the state defendants from conducting the fall, 1988 elections for those judgeships the Attorney General refused to preclear.

December 15, 1988 --

The single-judge court, pursuant to Section 2, enjoined further elections for trial and appellate court judges in Louisiana, with the consent of the state defendants.

June 12, 1990 --

Single-judge district court modified earlier Section 2 findings of liability and issued an opinion regarding the type of court-ordered remedy to be implemented for the remaining Section 2 violations.

July 6, 1990 --

Single-judge district court issued order modifying the December 15, 1988 Section 2 injunction consented to by the state defendants so that the injunction, as modified, covers only judicial elections in the eleven judicial districts found to be in violation of Section 2 in the single-judge court's June 12, 1990 opinion.

July 23, 1990 --

Plaintiffs' Section 5 motion to the three-judge court to enjoin at-large elections for unprecleared judgeships filed.

September 28, 1990 --

Order issued by three-judge court permitting elections to go forward but enjoining the taking of office by the winners of the elections.

October 1, 1990 --

Plaintiffs' Section 5 motion to the three-judge court to enjoin elections for unprecleared seats that previously were covered by the single-judge court's Section 2 injunction filed.

October 2, 1990 --

Single-judge district court issued order vacating the previous Section 2 injunction as a result of

the Fifth Circuit's decision in LULAC v. Clements, and setting a special election schedule for all districts previously under that injunction (candidate qualification October 3-5; first primary November 6; runoff December 8).

October 2, 1990 --

Three-judge district court issued order permitting elections to go forward and setting a special election schedule for all unprecleared judgeships within the districts covered by the previous Section 2 injunction, but prohibiting the winning candidates from taking office (candidate qualification October 3-5; first primary November 6; runoff December 8).

October 19, 1990 --

Single-judge district court rendered final judgment under Rule 54(b) against plaintiffs on the Section 2 claims in light of the Fifth Circuit's decision in LULAC v. Clements.

October 22, 1990 --

Three-judge district court issued order permitting elections to go forward and permitting the winners to take office (with the exception of three judgeships on the Third Circuit Court of Appeal, for which the elections are enjoined).

October 26, 1990 --

Notice of appeal to the United States Supreme Court filed.

October 31, 1990--

Opinion of three-judge district court issued.

November 6, 1990 --

Supplemental notice of appeal to the United States Supreme Court filed.

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, et al.

versus

CIVIL ACTION
NO. 86-435-A

EDWIN W. EDWARDS, Governor
of Louisiana, et al.

ORDER CONSTITUTING THREE-JUDGE COURT

[Filed July 9, 1986]

(1) REQUESTING JUDGE: John V. Parker
U.S. District Judge

(2) DISTRICT JUDGE: Frank J. Polozola
District Judge, and

(3) CIRCUIT JUDGE: Alvin R. Rubin,
U.S. Circuit Judge

The requesting judge (1) above named, to whom an application for relief has been presented in the above cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of

three judges, I, Charles Clark, Chief Judge of the Untied States Court of Appeals for the Fifth Circuit, hereby designate the circuit judge (3) and district judge (2) named above to serve with the requesting judge (1) as members of, and with him to constitute, the said court to hear and determine the action.

This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this properly is a case for a three-judge court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the chief judge of the

circuit, the presiding judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-judge panel either preliminarily or on the trial of the merits, or otherwise, as the court thinks appropriate.

/s/ Charles Clark
Charles Clark
Chief Judge
United States Court of
Appeals for the Fifth
Circuit

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, et al.

versus

CIVIL ACTION
NO. 86-435-A

EDWIN W. EDWARDS, Governor
of Louisiana, et al.

AMENDED
ORDER RECONSTITUTING THREE-JUDGE COURT

[Filed August 13, 1986]

(1) REQUESTING JUDGE: John V. Parker
U.S. District Judge

(2) DISTRICT JUDGE: Frank J. Polozola
District Judge, and

(3) CIRCUIT JUDGE: Alvin R. Rubin,
U.S. Circuit Judge

The requesting judge (1) above named, to whom an application for relief has been presented in the above cause, having earlier notified Chief Judge Clark that the action is one required by act of Congress to be heard and determined by a

district court of three judges, and he having previously designated a circuit judge and district judge (2) named above to serve with the requesting judge (1) as members of, and with him to constitute, the said court to hear and determine the action; and,

The circuit judge originally designated by Chief Judge Clark having stood recused in the case, and Chief Judge Clark being absent from the Circuit at this time, I, Thomas Gibbs Gee, Acting Chief Judge of the United States Court of Appeals for the Fifth Circuit, hereby designate the circuit judge (3) and redesignate the district judge (2) named above to serve with the requesting judge (1) as members of, and with him to constitute, the said court to hear and determine the action.

The designation and recomposition of the three-judge court is not a prejudgment, express or implied, as to whether this properly is a case for a three-judge rather than a one-judge court. This is a matter best determined by a three-judge court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, of both, directed against the chief judge of the circuit, the presiding judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-judge panel either preliminarily or on the trial of

the merits, or otherwise, as the court thinks appropriate.

/s/ Thomas Gibbs Gee
Thomas Gibbs Gee
Acting Chief Judge
United States Court of
Appeals for the Fifth
Circuit

Dated: August 8, 1986

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, et al.

versus

CIVIL ACTION
NO. 86-435-A

EDWIN W. EDWARDS, Governor
of Louisiana, et al.

ORDER

[Entered July 30, 1987]

The plaintiffs previously filed a motion for leave to file the third amended complaint in this class action. The third amended complaint would have:

1. Streamlined the challenge to multimember judicial districts--brought under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the Fourteenth and Fifteenth

Amendments to the Constitution--so that it raised claims only against certain specific districts rather than challenging all multimember districts statewide, and dismissed without prejudice the claims against the remaining districts which are not specified in the new proposed amended complaint.

2. Added named plaintiffs from certain districts which remained under challenge in the new third amended complaint.

3. Redefined the class, presently identified as a statewide class of black voters, so that it remained statewide for purposes of the Section 5 claims, but encompassed only the black voters in each specific district contained in the third amended complaint for purposes of the Section 2 and constitutional challenges.

4. Dismissed without prejudice the pendent challenge against multimember districts brought under the Louisiana Constitution, and contained in the previous complaint.

5. Added a number of Section 5 violations which the plaintiffs have uncovered since the filing of the previous complaint, all involving alleged failures by the State of Louisiana to preclear statutes governing judicial elections, and removed from the previous complaint

those Section 5 violations which have now been cured through preclearance.

In response to the motion, the Court denied the motion with respect to the amendments contained in No. 1 and 3 above, but granted the motion with respect to Numbers 2, 4, and 5 above. In order to conform to the court's ruling, the plaintiffs have now filed a fourth amended complaint which adds the new plaintiffs, deletes the claims brought under the Louisiana Constitution (without prejudice), and adds the Section 5 violations. The fourth amended complaint does not contain the streamlining of the Section 2 claims that was in the third amended complaint. Because this fourth amended complaint conforms with the Court's previous order, the fourth

amended complaint should be filed in this case.

Accordingly, it is ordered that the fourth amended complaint be filed with the clerk of the court in this case. This 30th day of July, 1987.

/s/ John V. Parker
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ORSCINI L. BEARD EDDIE G. CRAWFORD, NORBERT C. RAYFORD, AND VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOKS, CONNIE SADLER, LLOYD DANGERFIELD, TOM NELSON, ALBERT RICHARD, BRENDA FORD, EDWARD LARVADAIN, AND JOSIE FRANK.

Plaintiffs,

vs. CIVIL ACTION
NO. 86-435
SEC. A

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; JAMES H. BROWN, SECRETARY OF STATE OF LOUISIANA; IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA.

Defendants.

FOURTH SUPPLEMENTAL AND AMENDED COMPLAINT

1. This is a cause of action arising under Section 2 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C.

Sections 1973 and 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, challenging (1) the failure of the State of Louisiana to submit for preclearance pursuant to Section 5 of the Voting Rights Act a number of changes affecting elections of Appellate, District, and Family Court Judges in the State of Louisiana; (2) the use of a separate and distinct divisional at large scheme within a judicial district of electing judges which has the effect of minimizing black voting strength for the election of District Court, Family court, and Appellate Court Judges in the State of Louisiana.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. Sections 1331, 1343(3) and (4), and 42 U.S.C. Sections 1973, 1973a(c), and 1973(f). A court of three judges is required by 42 U.S.C. Section 1973c to adjudicate those claims arising under Section 5 of the Voting Rights Act. Plaintiffs further seek declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202.

* * *

FACTS

* * *

23. A number of statutes passed by the legislature since November 1, 1964, as well as pertinent provisions of the Louisiana Constitution passed since that time, affecting judicial elections and number of judges elected from various

divisions and judicial districts within the State of Louisiana have not been precleared by the Attorney General of the United States nor the United States District Court for the District of Columbia, as required by Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973(c). Among those constitutional provisions and statutes which have not been precleared are the following:

LOUISIANA CONSTITUTION

Article Number	Year of Law	Section	Effect of Change
5	1974	15	Retained District Court in existence but stated that each could only be divided with approval in a referendum in each district or parish affected.
5	1974	22 & 24	Changed requirements for the elections of Judges.
14	1974	16(A)(5)	Retained Article VII Section 33 of the 1921 Constitution regarding the election of judges as a statute.

LOUISIANA STATUTES

DISTRICT COURTS

LA. Code	Year	Act and Part	Effect of Statute
13:477	1975	Acts 1975 No. 13	Separated 25th district and created 34th district as follows: 25th district--Plaquemines, 34th district -- St. Bernard Preserved two judgeships (Divisions A and B) for the 25th district. Created two judgeships (Divisions A and B) for the 34th district to be elected at-large. Preserved district attorney's office for the 25th district. Created district attorney's office for the 34th district.
	1979	Acts 1979, No. 635	Separated 10th district and created 39th district as follows:

			10th district--Natchitoches, 39th district--Red River Preserved judgeships for the 10th district. Created judgeship for the 39th district. Preserved district attorney's office for the 10th district. Created district attorney's office for the 39th district.
13:621.1	1973	Acts 1973, No. 117	Increased number of judges in the 1st judicial district from 5 to 6. Created Division F for purposes of nomination and election.
13:621.4	1970	Acts 1970, No. 480	Increased number of judges in the 4th judicial district from 3 to 4. Created Division D for purposes of nomination and election.
13.621.6	1974	Acts 1974,	Increased number of judges in

		No. 515	the 6th judicial district from 1 to 2. Created Divisions A and B for purposes of nomination and election.
13:621.9	1971	Acts 1971, No. 158	Increased number of judges in the 9th judicial district from 3 to 4. Created Division D for purposes of nomination and election.
	1974	Acts 1974 No. 19, No. 515 (identical)	Increased number of judges in the 9th judicial district from 4 to 5. Created Division E for purposes of nomination and election.
13:621.13	1980	Acts 1980 No. 156, No. 322	Increased number of judges in the 13th judicial district from 1 to 2. Created Divisions A and B for purposes of nomination and election.
13.621.14	1967	Acts 1967,	Increased number of judges in

		No. 40	the 14th judicial district from 4 to 5. Created Division E for purposes of nomination and election.
	1975	Acts 1975, No. 332	Increased number of judges in the 14th judicial district from 5 to 6. Created Division F for purposes of nomination and election.
13.621.15	1970	Acts 1970 No. 360	Increased number of judges in the 15th judicial district from 4 to 5. Created Division E for purposes of nomination and election.
	1976	Acts 1976, No. 43	Increased number of judges in the 15th judicial district from 5 to 6. Created Division F for purposes of nomination and election.

13:621.16	1968	Acts 1968, No. 104	Increased number of judges in the 16th judicial district from 3 to 4. Created Division D for purposes of nomination and election.
13:621.17	1967	Acts 1967, No. 35	Increased number of judges in the 17th judicial district from 3 to 4.
	1968	Acts 1968, No. 307	Decreased number of judges in the 17th judicial district from 4 to 2 upon the creation of the 32nd district. 4 judges plus 1 additional judge served until the regular election of 1972.
	1970	Acts 1970, No. 124	Provided an additional judge to serve in the 17th district until the regular election of 1972, when the additional judgeship would become operative in the 32nd district upon that district's effective creation. Created Division E

			in the 17th district for purposes of nomination and election until 1972.
	1972	Acts 1972, No. 11	Provided that the 17th judicial district have 2 judges.
13:621.18	1968	Acts 1968, No. 86	Increased number of judges in the 18th judicial district from 2 to 3. Created Division C for purposes of nomination and election.
13:621.20	1981	Acts 1981, Ex. Sess, No. 34	Increased number of judges in the 20th judicial district from 1 to 2. Created Divisions A and B for purposes of nomination and election.
13:621.21	1974	Acts 1974, No. 9	Increased number of judges in the 21st judicial district from 3 to 4. Created Division D for purposes of nomination and election.

13:621.22 1970	Acts 1970, No. 23	Increased number of judges in the 22nd judicial district from 2 to 3. Created Division C for purposes of nomination and election.
13:621.23 1968	Acts 1968, No. 464	Increased number of judges in the 23rd judicial district from 2 to 3. Created Division C for purposes of nomination and election.
13:621.24 1968	Acts 1968, No. 78	Increased number of judges in the 24th judicial district from 7 to 9. Created Divisions H and I for purposes of nomination and election.
1968	Acts 1968, No. 674 No. 694	Authorized an additional judgeship for the 24th district upon petition of the Jefferson Parish Police Jury.

1974	Acts 1974, No. 503	Increased number of judges in the 24th judicial district from 9 to 11. Created Divisions J and K for purposes of nomination and election
13:621.25 1964	Acts 1964, No. 314	Increased number of judges in the 25th judicial district from 2 to 3. Created Division C for purposes of nomination and election.
1970	Acts 1970, No. 60	Increased number of judges in the 25th judicial district from 3 to 4. Created Division D for purposes of nomination and election.
13:621.26 1970	Acts 1970, No. 230	Increased number of judges in the 26th judicial district from 2 to 3. Created Division C for purposes of nomination and election. Division C judge to reside in Bossier or Webster.

	1975	Acts 1975, No. 733	Increased number of judges in the 26th judicial district from 3 to 4. Created Division D for purposes of nomination and election. Division D judge to reside in 26th district.
13:621.27	1971	Acts 1971, No. 158	Increased number of judges in the 27th judicial district from 2 to 3. Created Division C for purposes of nomination and election.
13:621.29	1970	Acts 1970, No. 94	Increased number of judges in the 29th judicial district from 2 to 3. Created Division C for purposes of nomination and election.
13:621.30	1972	Acts 1972, No. 11	Increased number of judges in the 30th judicial district from 1 to 2. Created Divisions A and B for purposes of nomination and election.

13:621.32	1968	Acts 1968, No. 307	Provided that the newly created 32nd judicial district have 2 judges.
	1970	Acts 1970, No. 124	Increased number of judges from 2 to 3 by providing an additional judge for the 17th district (Division E), to become a judge for the 32nd district upon its creation in conjunction with the division of the 17th district.
	1974	Acts 1974, No. 84	Increased number of judges in the 32nd judicial district from 3 to 4. Created Division D for purposes of nomination and election.
13:621.33	1968	Acts 1968, No. 694	Provided that the 33rd judicial district have 1 judge.
13:621.39	1979	Acts 1979, No. 635	Provided that the 39th judicial district have 1 judge.

13:1136	1975	Acts 1975, No. 129	Determined that there be one Civil District Court for Orleans Parish, to be composed of ten judges.
	1980	Acts 1980, No. 86	Added subsection E, setting date for elections and for commencement of terms for Civil District Court for Orleans Parish.
13:1137	1975	Acts 1975, No. 62	Determined jurisdiction of Civil District Court for Orleans Parish in relation to district court jurisdiction.
13:1335	1975	Acts 1975, No. 143	Determined that there be one Criminal District Court for Orleans Parish, to be composed of ten judges. Determined date of election and commencement of service.
13:1336	1975	Acts 1975,	Determined jurisdiction of

		No. 144	Orleans Parish Criminal District Court.
13:1346	1972	Acts 1972, No. 236	Created an additional judgeship for the Orleans Parish Criminal District Court.

FAMILY AND JUVENILE COURTS

13:1401	1975	Acts 1975, No. 89	Established the Family Court for the parish of East Baton Rouge; defined jurisdiction.
13:1403	1975	Acts 1975, No. 89	Provided that the Family Court for East Baton Rouge Parish have 1 judge.
13:1564	1975	Acts 1975, No. 152, No. 743	Revised language pertaining to procedures in judge's absence and to qualifications of judges for the Juvenile Court for Caddo Parish; requiring that judges be admitted to bar at

			least five years prior to election.
	1977	Acts 1977, No. 63	Increased number of judges for the Juvenile Court for Caddo Parish from 1 to 2. Created Divisions A and B for purposes of nomination and election. Revised language pertaining to procedures in judge's absence and to qualifications of judges.
13:1595.1	1976	Acts 1976, No. 683	Increased number of judges for Orleans Parish Juvenile Court from 4 to 5. Created Division E for purposes of nomination and election.
13:1596	1972	Acts 1972, No. 265	Increased number of judges for Jefferson Parish Juvenile Court from 1 to 2.

	1980	Acts 1980, No. 442	Increased number of judges for Jefferson Parish Juvenile Court from 2 to 3. Created Division C for purposes of nomination and election.
COURTS OF APPEAL			
13:312	1975	Acts 1975, No. 52	Designated circuits and districts for the Courts of Appeal.
13:312.1	1975	Acts 1975, No. 114	Determined number of judges and judicial election procedure for the Courts of Appeal.
13:312.2	1975	Acts 1975, No. 114	Increased number of 1st circuit judges from 6 to 9, providing that 1 additional judge be elected from each of the 3 1st circuit districts. After initial terms elected for 10-year terms.

13:312	1975	Acts 1975, No. 305	Provided that each district of the various courts of appeal have separate and distinct divisions for purposes of nomination and election. Divisions to be designated alphabetically, with judges presiding over the various divisions on the basis of seniority ranking. Any candidate for nomination or election must designate a division for which he or she is a candidate. New divisions automatically created with the creation of new judgeships. Provided for determination of divisions. Provided that each 1st circuit district have 3 Divisions, A, B, and C, for purposes of nomination and election. Provided for the possibility of electing court of appeals judges at-large from a combination of districts.

* * *

VIOLATIONS

37. The failure to preclear all of the enactments listed in paragraph 23 pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, deprives plaintiffs and all those similarly situated of rights guaranteed by Section 5 of the Voting Rights Act.

* * *

RELIEF

WHEREFORE, plaintiffs pray that this Court set this matter down for an expedited and speedy hearing, and upon such hearing:

Relief under Section 5 of the Voting Rights Act:

a) Convene a District Court composed of three judges, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to hear plaintiffs' claims under Section 5, and upon such hearing, declare unenforceable those provisions outlined in paragraph 23 and enjoin all further elections under those provisions until preclearance is obtained.

* * *

b) Grant plaintiffs reasonable attorneys' fees and costs as provided under 42 U.S.C. 1983 and 1988, and such other relief as may be just and equitable.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

----------x

JANICE G. CLARK, et al.

Plaintiffs, CIVIL ACTION
NO. 86-435
vs. SEC. A

EDWIN W. EDWARDS, GOVERNOR
OF LOUISIANA; et al.

Defendants.

----------x

MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION UNDER SECTION 5 OF THE VOTING RIGHTS ACT TO PREVENT THE OCTOBER 1, 1988 ELECTION FOR UNPRECLEARED JUDGESHIPS

[Filed, July 28, 1988]

COME NOW the plaintiffs and move for a preliminary and permanent injunction pursuant to Section 5 of the Voting Rights Act to prevent the scheduled October 1, 1988 primary elections for Division C of the 22nd Judicial District

Court, for the newly created at-large judgeship on the Second Circuit Court of Appeal, and for Divisions C of the First, Second, and Third District of the Third Circuit Court of Appeal, on the ground that the legislation establishing these judgeships has never been precleared as required by Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. In addition, and in the event only one candidate qualifies for any of these judgeships (thereby allowing that candidate to be designated the winner of the judgeship under state law), the plaintiffs move for a preliminary and permanent injunction preventing the defendants from taking any action to certify or otherwise install any candidate as a judge in any of these unprecleared judgeships.

In support of this motion, the plaintiffs would show the following:

1. Division C of the 26th Judicial District court was established in 1970 by the Louisiana legislature. Acts 1970, No. 23. That legislation increased the number of judges in the multimember 22nd district from two to three.

2. In 1987, the Louisiana legislature created a new judgeship to be elected at-large from the Second Circuit Court of Appeal, and the following three new judgeships for the Third Circuit Court of Appeal: Third Circuit, District 1 (Division C); Third Circuit, District 2 (Division C); and Third Circuit, District 3 (Division C). Acts 1987, No. 801. Acts 1987, No. 801 also provides that elections for these newly created judgeships are to be held in the fall of

1988, with the winners to take office January 1, 1989.

3. A special election to fill a vacancy in Division C of the 22nd Judicial District, and regular elections to fill the newly created judgeships described in paragraph 2 above, are set for an October 1, 1988 primary, with the runoff election scheduled November 8, 1988. The candidate qualifying period for all of these judgeships is July 27-29, 1988.

4. Acts 1970, No. 23, and Acts 1987, No. 801 have never been precleared by the Attorney General of the United States or the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act.

5. Any voting changes such as those made by Act 23 of 1975, and Act 801 of 1987 are not enforceable without preclearance. Accordingly, this Court should grant a preliminary injunction to prevent their enforcement and the October 1, 1988 election unless and until preclearance is obtained.

6. Louisiana law provides that, in the event only one candidate qualifies for a judicial election, that candidate shall be declared the winner. In the event only one candidate qualifies for any of the judgeships listed in this motion, the plaintiffs move for a preliminary or permanent injunction prohibiting the defendants from certifying or commissioning that candidate as a judge or taking any other steps to install that candidate as a judge.

Respectfully submitted

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[Certificate omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

----------x
JANICE G. CLARK, et al.

vs. CIVIL ACTION
NO. 86-435
SEC. A

CHARLES "BUDDY" ROEMER,
GOVERNOR OF LOUISIANA; et al.
----------x

PLAINTIFFS' MOTION TO THE THREE-JUDGE COURT TO ENJOIN AT-LARGE ELECTIONS FOR CERTAIN UNPRECLEARED JUDGESHIPS

[Filed July 23, 1990]

Come now the plaintiffs and move this Three-Judge Court for a preliminary and permanent injunction to prevent the use of the present at-large election format for certain state district court and court of appeal judgeships for which preclearance has not been obtained under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, and to prevent the

certification or installation of any candidate who attains one of those judgeships so long as the unprecleared at-large system is in place. Those judgeships are listed later in this motion.

In support of this motion, the plaintiffs show the following:

1. Over the years, officials of the State of Louisiana have failed to submit for preclearance under Section 5 of the Voting Rights Act a number of electoral changes regarding state district court and court of appeal judgeships, particularly the creation of new judgeships to be elected at-large within pre-existing judicial districts. Despite the absence of preclearance, the State nevertheless implemented most of the changes and filled the judgeships

through election. The complaint in this case included a Section 5 challenge to the failure to obtain preclearance of these electoral changes.

2. After the complaint was filed, state officials submitted many of the unprecleared changes to the United States Attorney General for preclearance. However, on September 23, 1988, the Department of Justice refused preclearance to a number of these changes because they would, in the words of the Department's objection letter, be implemented "in the context of a racially discriminatory election method." Letter of September 23, 1988 from United States Assistant Attorney General William Bradford Reynolds to Kenneth C. DeJean of the Louisiana Attorney General's office at p. 2. (A copy of the letter is

attached as an exhibit to this motion). The racially discriminatory election method to which the letter referred is the existing at-large election method. Id. at 1-2. Also, on May 12, 1989, the Department of Justice denied preclearance to some additional changes for the same reasons. Letter of May 12, 1989 from Acting United States Assistant Attorney General James P. Turner to Kenneth C. DeJean. (A copy is attached as an exhibit to this motion).

3. In light of the state's failure to obtain preclearance, this Three-Judge Court issued orders dated August 26, 1988, and September 27, 1988, that enjoined the then-impendent elections for unprecleared judgeships in the Second Circuit Court of Appeal (at-large), and the Third Circuit Court of Appeal,

District 1 (Division C), District 2 (Division C), and District 3 (Division C), all of which had been created by Act 801 of 1987.

4. The Justice Department's September 23, 1988 and May 12, 1989 objection letters cited the August, 1988 findings of the Hon. John V. Parker, sitting as a single judge in the portion of this case litigated under Section 2 of the Voting Rights Act, wherein Judge Parker concluded that Section 2 violations exist as a result of at-large elections in a number of district court and court of appeals judgeships in the state. See Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988). Most, but not all, of the Justice Department's objections involved unprecleared judgeships in the districts where Judge

Parker found a Section 2 violation. Since that time, in an order dated June 12, 1990, Judge Parker modified his holding, and narrowed the number of districts in which he found Section 2 violations to a total of eleven. Accordingly, state officials have now asked the Department of Justice to reconsider its objections, and to grant preclearance to all judgeships in those districts where Judge Parker originally found a violation but later changed his finding and concluded that no violation exists. As of the writing of this motion, the Justice Department has not taken any action, and the Section 5 objections are still in place.

5. The State's letters to the Department of Justice requesting reconsideration are dated June 18 and

June 20, 1990. The Department of Justice normally takes sixty days to process preclearance requests, including requests for reconsideration, and a decision on the State's request in this instance is expected on or around August 20, 1990. It is possible the Justice Department will reconsider its objections and preclear all of the judgeships that are the subject of this motion. However, in the event preclearance is not forthcoming, the plaintiffs are filing this motion to prevent any elections for unprecleared judgeships under the existing at-large election format.

6. Judge Parker has in place an injunction preventing elections in any of the eleven districts in which he found a Section 2 violation. They are the first, fourth, ninth, fourteenth, fifteenth,

eighteenth, nineteenth, twenty-fourth, and fortieth district court districts; the first circuit, district 2 of the court of appeal; and the East Baton Rouge family court. In addition, Judge Parker's June 12 opinion mandates the implementation of electoral subdistricts within those eleven districts as a remedy for the Section 2 violation. Given that Judge Parker's injunction and the remedy he has ordered provide all of the relief to which plaintiffs are entitled in those districts under Section 2 or Section 5, the plaintiffs are not including any of the judgeships in those districts in this request for relief under Section 5.

7. The unprecleared judgeships for which the plaintiffs seek to enjoin any further at-large election under Section 5 include the following, all of which were

the subject of the Justice Department's September 23, 1988 and May 12, 1989 objection letters:

District Court

District	Division	Statute
6	B	Act 515 (1974)
16	D	Act 104 (1968)
	G	Act 56 (1984)
20	B	Act 34 (1981)
21	D	Act 9 (1974)
	F	Act 56 (1984)
23	C	Act 464 (1968)
27	C	Act 158 (1971)
29	C	Act 94 (1970)
Orleans Criminal	Magistrate's Position	Act 236 (1972)
Orleans Criminal	F,G,H, I,J	Act 143 (1975)

Orleans Civil	F,G,H, I,J	Act 235 (1970) (Div. J) Act 129 (1975) (all 5 judgeships)

Courts of Appeal

First Circuit, District 3	C	Act 114 (1975)
Second Circuit	At-Large	Act 114 (1975)
	At-Large	Act 801 (1987)*
Third Circuit	At-Large	Act 114 (1975)
Third Circuit District 1	C	Act 801 (1987)*
Third Circuit District 2	C	Act 801 (1987)*
Third Circuit District 3	C	Act 801 (1987)

All of the foregoing judgeships except those with an asterisk were filled by election even absent preclearance and most, if not all, are currently occupied by sitting judges. Those with an asterisk were enjoined prior to the initial election, and are vacant.

8. In addition, the plaintiffs seek to enjoin elections for the following judgeships:

** All judgeships in the 10th and 39th judicial districts inasmuch as the Department of Justice has objected to Act 635 (1979), which split the former 10th judicial district, creating two districts -- the new 10th composed of Natchitoches Parish and the new 39th composed of Red River Parish.

** All judgeships in the First Circuit, Districts 1 and 3 inasmuch as the Department of Justice has objected to Act 305 (1975), which adopted designated posts (divisions) for all judgeships in those districts. (The plaintiffs do

not seek this relief under Section 5 with respect to the First Circuit, District 2, since sufficient relief already is being granted in the Section 5 with respect to the First Circuit, District 2, since sufficient relief already is being granted in the Section 2 component of this litigation).

Elections for all of the judgeships listed in this paragraph were held despite the absence of preclearance and most, if not all, are currently filled by sitting judges.

9. Also, the plaintiffs seek to enjoin elections for the following judgeships that have recently been created by the Louisiana legislature, but have yet to be either precleared or denied preclearance by the Department of Justice, and which have yet to be filled by election:

District Courts

District	Division	Act
22	G	Act 8 (1990)
26	E	Act 174 (1989)
Orleans Civil	M, N	Act 8 (1990)

Courts of Appeal

Second Circuit, District 1	C	Act 8 (1990)

(Note: Act 8 of 1990 took the unprecleared at-large Second Circuit judgeship original created by Act 801 of 1987 and allotted it to Division C of District 1 of the Second Circuit).

Second Circuit, District 3	C	Act 8 (1990)

10. As previously noted, State officials have asked for reconsideration of the Justice Department's Section 5 objections, and also for preclearance of other recently enacted judgeships, and the Justice Department's response is expected in late August of this year. In the event the Justice Department does not reverse the prior objections, and leaves some or all of the electoral law changes unprecleared, the plaintiffs will move the Court for any additional relief necessary to cure the discriminatory election features that led to the Section 5 objections and to remedy fully the Section 5 violations.

In light of the foregoing, and absent any preclearance by the United States Attorney General, an injunction should issue preventing the use of the

present at-large election format for the judgeships listed in paragraphs 7-9 above, and preventing the certification or installation of any candidate elected to any of those judgeships under the present at-large format. A proposed memorandum of law and proposed order accompany this motion.

Respectfully submitted,

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[Certificate and Attachments
omitted in printing]

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT

STATE OF LOUISIANA

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD	:	CIVIL ACTION NO. 86-435 SEC. A
Plaintiffs,	:	
versus	:	
CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA	:	THREE JUDGE COURT CONSISTING OF CIRCUIT JUDGE W. EUGENE DAVIS JUDGE JOHN V. PARKER CHIEF JUDGE FRANK J. POLOZOLA
Defendants.	:	

OPPOSITION TO PLAINTIFFS' MOTION AND ITS FIRST AND SECOND SUPPLEMENTATION

[Filed September 27, 1990]

For the reasons as more specifically set forth in the attached Memorandum, Plaintiffs' Motion and Its First and Second Supplementation should be denied.

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT

STATE OF LOUISIANA

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD	:	CIVIL ACTION NO. 86-435 SEC. A
Plaintiffs,	:	
versus	:	
CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA	:	THREE JUDGE COURT CONSISTING OF CIRCUIT JUDGE W. EUGENE DAVIS JUDGE JOHN V. PARKER CHIEF JUDGE FRANK J. POLOZOLA
Defendants.	:	

MEMORANDUM IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION AND ITS FIRST AND SECOND SUPPLEMENTATION

[Filed september 27, 1990]

Simply put, the question presented by these proceedings, is: **Does the Justice Department which lies within the Executive Branch of Government, have the authority to second guess and thereby overrule another branch of government, the Judiciary?**

Plaintiffs, as surrogate for, and in relying on the conclusions reached by, the Justice Department now, on the eve of an election, seek to set aside, as for naught, most of what has been judicially resolved after four years of intense litigation.

Chief Judge Parker has devised a remedy in this proceeding which follows the dictates of the Fifth Circuit that

there be specific, detailed findings of fact in vote dilution cases encompassing, while doing so, all of the districts involved in the judicial selection system for district, family court and courts of appeal judges.

This case has taken into consideration each of the applicable statutory provisions of the Louisiana law concerning judgeship districts through those enacted in 1988. Timing did not permit an examination of the judicial districts created in 1989 and 1990.

Judge Parker's analysis of these districts is contained in his Findings of Fact and Conclusions of Law Remedy Phase as follows:

> JDC District 6 at page 6; JDC District 10 at page 21; JDC District 16 at pages 25-26; JDC District 20 at pages 28-29; JDC District 21 at pages 29-30; JDC District 23 at pages 30-35; JDC District 27 at pages 33-34; and JDC District 29 at page 34.

Additionally, Chief Judge Parker specifically held that as to all of the Courts of Appeal, circuitwide, there was no statutory violation [page 39], further, except for the First Circuit, District 2, Chief Judge Parker found no statutory violation in any of the Courts of Appeal districts [pages 40-43].

In fashioning a remedy, Chief Judge Parker recalled and recast his earlier beliefs that he was empowered to adopt a systematic remedy [page 44-45] and also adhered to the federal jurisprudence that there should not be intrusion on state policy any more than necessary [page 45]. There followed a detailed examination of the Louisiana law as set forth in Louisiana's Election Code, L.R.S. § 18, [pages 43-45] the entire provisions of

which have been precleared by the Justice Department.

Judge Parker's plan, as reflected in the Court's Findings of Fact and Conclusions of Law Remedy Phase, is two-fold[1/]:

> (1) There are no violations in the following judicial districts which would require changes: 2nd, 3rd, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 16th, 17th, 20th, 21st, 22nd [except Div. C], 23rd, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, Orleans Civil District Court, and Orleans Criminal District Court; and the following Courts of Appeal: Courts of Appeal Circuitwide, First Circuit [except District 2], Second Circuit, Third Circuit, Fourth Circuit and Fifth Circuit; and

> (2) There are violations in the following judicial districts: 1st, 4th, 9th, 14th, 15th, 18th, 19th, 24th, 40th, Family Court East Baton Rouge, and the First Circuit Court of Appeal District 2. As to each of these, subdistricts are to be drawn by a concurrence of the parties or in default thereof by the Court.

There having been formulated a judicially adopted plan, the question remains what need, if any, is there for preclearance? Both the Fifth Circuit and the Supreme Court have addressed this question.

> It must be noted that this is not a case in which a legislature, board, or commission attempted to reapportion itself. In such a case, Section 5 clearly applies. What we have here is an adversary action, invoking the equity jurisdiction and the equitable adjudication of the District Court. As the Supreme Court succinctly said in Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268, and as this Court said in Sheffield v. Itawamba

> County Board of Supervisors, 5 Cir., 1971, 439 F.2d 35, court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5. If this were not so, the exercise of jurisdiction by the courts would be meaningless. The Attorney General has no authority to review or to set aside the judgments of courts duly entered in the exercise of their jurisdiction over the parties and the subject matter.

Zimmer v. McKeithen, 467 F.2d 1381, 1383 (5th Cir. 1972). There was a rehearing as to this panel decision in the Zimmer case, where the holding in the foregoing quotation was reiterated:

> 9. Marshall [one of the parties litigant] contended that the rule of Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971) and Sheffield v. Itawamba County Board of Supervisors, 439 F.2d 35 (5th Cir. 1971) that court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5 is inapposite where such plans are adopted by a court in "sweetheart" lawsuits. Although there may be merit in his contention that the failure to qualify Connor

> and Sheffield may result in the circumvention of the Voting Rights Act, we would merely note that the dilution standard is a viable means of reconciling the disparate treatment of governmental body approved plans and court approved plans under Section 5. Furthermore, since Section 5, 42 U.S.C. 1973c (1970), covers attempts to administer voting practices as well as attempts to enact them, see Roman, herein on the internal inconsistences evidenced in the position emanating from the Justice Department.

The first, and perhaps most glaring, inconsistency in the Justice Department's approach is evidenced by its failure to follow its own self-imposed regulations. 28 CFR Ch. 1 (7-1-89 Edition) § 5.56. This regulation provides that:

> § 5.56 Guidance from the courts.
>
> In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal Courts.

It may have been self evidently imposed but it was self obviously ignored. At

every turn possible, the Justice Department ignored Chief Judge Parker's findings.

The second, and perhaps most obvious, conflict in the Justice Department's fulfillment of its statutorily imposed duties relates to the inconsistencies readily apparent as to the judgeships in Orleans created by Act 8 of 1990. Its letter, dated September 17, 1990, addressed to Cynthia Y. Rougeau, Esq., without elaboration simply says "[w]ith regard to the changes under Act 8 (1990) for the Orleans Parish Civil District Court, the Attorney General does not interpose any objections to the changes in question." Meanwhile, concomitantly therewith the Justice Department strikes at the creation of the other judicial sections

in the same Act, namely, i.e. in the Second Circuit Courts of Appeal and the new judgeship in Division G in the 22nd Judicial District. Significantly all of these judicial positions were created in the same Act which underwent the same legislative process as its enactment. In its evaluation letters as to this Act, the Justice Department insists that only judicial races in which black candidates participate are to be evaluated. (See letter from U.S. Department of Justice to Cynthia Young Rougeau, Esquire, dated August 20, 1990, paragraph 2.) This simply isn't the law. This matter was addressed in the case of Sanchez v. Bond, 875 F.2d 1488 (10th Cir. 1989):

> The *Gingles* opinion offers little guidance on what significance the race of the candidates is to be given in assessing a 2 claim. In *Gingles, the district court found that black voters had been denied*

equal opportunity to elect candidates of their preference. In reaching this finding, the district court considered only elections that pitted black candidates against white candidates. The Supreme Court affirmed but was divided on the importance of the race of the minority group's candidate. Four justices were of the view that "the race of the candidate per se is irrelevant to racial bloc voting analysis." Id. at 67, 106 S.Ct.at 1775. Under this view, only the *status* of the candidate as the chosen representative of a racial group is important. Id. A total of five justices, however, felt that such a hard and fast rule was contrary to precedent and was not necessary to the disposition of the case. Id. at 83, 101, 106 S.Ct. at 2784, 2793. This division on the Supreme Court prompted a difference of opinion among the circuit courts as well. At least one circuit has adopted Justice Brennan's view that the race of the candidate is irrelevant to voting analysis. *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987). In contrast, two Fifth Circuit cases have interpreted *Gingles* to mean that "the race of the candidate is in general of less significance than the race of the voter--but only within the context of an election that offers voters the choice of supporting a viable minority candidate." *Campos v. City*

of Baytown, Texas, 840 F.2d 1240, 1245 (5th Cir. 1988), petition for cert. filed, (citing *Citizens For a Better Gretna v. City of Gretna*, La., 834 F.2d 496 (5th Cir. 1987), *rehearing denied* 849 F.2d 1471, petition for cert. filed. These cases suggest that the court should exclude from its analysis elections that do not include a candidate who is a minority. *Gretna*, 834 F.2d at 504 ("[I]mplicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate.") *But see Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989) ("In the absence of further Supreme Court guidance, we do not criticize this methodology, although it is not the only permissible way to approach 2 claims.")

We do not believe that a per se rule against examining races that have only white candidates is implicit in *Gingles*. Such a rule would be clearly contrary to the plurality opinion, which views the race of the candidates as irrelevant in voting analysis. Moreover, such a rule is questionable in light of the language of 2, which seeks to give minorities equal opportunity to "elect representatives *of their choice*." 42 U.S.C. § 1973(b). Nothing in the statute indicates that the chosen representative of a minority group must be a minority.

Additionally, § 2 requires that the district court make a determination from the totality of the circumstances. Accordingly, we conclude that there is no rule of law prohibiting the district court from examining those elections having only Anglo candidates. Such elections may be relevant and can be used to discern whether racially polarized voting exists and to measure the success of minority preferred candidates, so long as one of the Anglo candidates can be considered a preferred candidate of the minority group. As with other types of relevant evidence, the district court has a right to consider these elections and to give them such weight as the circumstances warrant. Based on the facts of this case, we cannot conclude that the district court erred in considering races having only Anglo candidates.

Id. at 1494-95.

Thirdly, the Justice Department wishes to impose upon Louisiana a limited voting scheme, a concept which Chief Judge Parker soundly rejected.

> As an alternative to the drawing of subdistricts, about which this court has voiced reservations from the beginning of the case,

plaintiffs have proposed the institution of a system of limited voting. This proposal is offered as a counter to the other side's suggestion of plurality voting. This system was described by Dr. Engstrom and essentially would limit the number of votes to be cast by each elector in multimember districts to some number less than the number of positions to be filled. The theory is that the minority in such an election can overcome the effects of majority vote dilution by putting their strength behind a particular candidate. The limited number of votes make it less likely that the majority will be able to determine the winners of all positions, thus eliminating the "winner-take-all" effect. This proposal would require elimination of Louisiana's majority vote requirement and would require all candidates to run, without designation by division, in a pool. Elections would be required at the conclusion of every term since all candidates would qualify for the same office and the top vote getters would fill the available positions.

This court declines to accept limited voting for several reasons. First, it makes more changes in Louisiana's chosen election system than required. At present, a competent judge frequently has no opposition for his reelection and no election is held, rewarding the

> judge for his service and saving the cost of an election. Under limited voting, an election would be necessary unless, for example, there were four positions to be filled and only four people qualified. The majority vote requirement has already been mentioned. Second, this court finds if (sic) difficult to comprehend how we expand access to the ballot box by limiting the number of votes each elector may cast.

Findings of Fact and Conclusions of Law, pages 51-52.

The majority vote requirement has, as indicated, already been addressed by Chief Judge Parker. Although in its objections the Justice Department suggested that Louisiana should abandon its majority vote requirement, Chief Judge Parker has refused to impose such a remedy for it would be radical departure from Louisiana's electoral process. Of course, this is the same process which the Justice Department approved regarding

a majority vote in judicial elections when the Justice Department precleared the Election Code. As Chief Judge Parker found in his Findings of Fact and Conclusions of Law:

> Title 18, the Election Code, also contains numerous provisions relating to election of judicial officers. Sections 511 and 512 are the only pertinent provisions and they deal with the election of candidates in primary and general elections: both sections require a majority vote.
>
> This court concludes that Louisiana's constitutional and statutory policies demonstrate a strong preference for popular election of judicial officers by majority vote.

P.48.

Further inconsistencies of the Justice Department exist as to many of the Acts here. To cite a few:

In Civil District Court, District 10, [hereafter "CDC ___"] after approving

a special election for a judge in CDC 39, 12 years later the Justice Department objected to the boundaries which, incidentally, were set forth in the Special Election Act already approved.

In CDC 16, after approving and preclearing judgeships for "E" and "F" division, created in 1977, the Justice Department objected 13 years later to a judgeship for "D".

In CDC 21, after approving and preclearing a judgeship for Division "E", 16 years later, the Justice Department objected to a judgeship created for Division "D".

In CDC 23, after preclearing a judgeship for Division "D", the Justice Department objected to the creation of a judgeship for Division "C" created 22 years earlier.

In CDC 27, after preclearing a judgeship for Division "D", the Justice Department reached back 19 years to object to a judgeship for Division "C".

In CDC 29, after preclearing a judgeship for Divisions "D" and "E", the Justice Department reached back 20 years to object to a judgeship for Division "C".

In CDC 39, after approving the Special Election for a judge, the Justice Department, 11 years later, objected to the boundaries within which this judge was to sit.

After preclearing Act 3 of 1981 concerning the First Circuit Court of Appeals' designated division, the Justice Department objected 15 years later to an Act to create District 3C.

Again, <u>after</u> preclearing Act 3 of 1981 clearing the First Circuit Court of Appeals' designated divisions the Justice Department objected, 15 years later, to the First Circuit's District 1C. In the case of the First Circuit, the movants base their lack of preclearance claims on failure to submit to the Justice Department Act 114 of 1975 (creating new judgeships) and Act 305 of 1975 (designation of divisions for the First Circuit). By Acts 1981, No. 3 three judgeships for the First Circuit were created, one to be elected at-large from each of the three election districts. In addition, Acts 1981, No. 3 provided for election by designated divisions and for election at-large within the election district. By letter of July 29, 1981, Acts 1981, No. 3 was submitted to the

U.S. Justice Department. The letter stated that in regard to the First Circuit, there would be 12 judges, 4 elected from each election district, and the alphabetical division would be retained. By letter of August 26, 1981, the U.S. Justice Department precleared Acts 1981, No. 3. There have been no new judgeships added to the First Circuit since Acts 1981, No. 3. There have been no changes in the boundaries of any of the three election districts. Accordingly, all of the 12 judgeships of the First Circuit have been precleared by the letter from the U.S Justice Department dated August 26, 1981. None of the judgeships in the First Circuit should be subject to Section 5 objection. The same is equally true for the remaining Circuit Courts of Appeal, the

Second, Third, Fourth and Fifth. Except for the 1987 and 1990 Legislation there has been no change in judgeships or boundaries, since all were specifically precleared by Acts 1981, No. 3.

Apparently the Justice Department merely pushed a typewriter/word processor for its conclusions without regard to the resulting text. In its letter of September 17, 1990, totally relied upon by movants, the Justice Department refers to nonexistent judicial citations. For instance:

> [I]t is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See . . . . City of Rome, supra, at 172; Busbee v. Smith, 549 F.Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

with a citation to City of Rome, supra, at 172. However, one looks in vain for

the supra citation. Apparently the Justice Department created its objection letters on the cut and paste approach.

Movants failed to prevail before the court and now wish to impose objections to legislative acts so old that many could qualify for a legally dead status if they were but human beings. Further, in its second supplemental motion movants state:

> Judges Holding Office In Unprecleared Judgeships
>
> The most immediate subject to the court's attention is the enjoining of elections for unprecleared judgeships. Once that matter is resolved, an issue will remain regarding the status of those judges holding office in unprecleared judgeships. The plaintiffs intend shortly to file a motion to declare those judgeships vacant at the end of their terms or, alternatively, to set a scheduled time by which the judgeships will be declared vacant in the event the State does not come up with an acceptable plan for election of

those judgeships that complies with the Voting Rights Act.

It thus appears that movants intend to continue the employment of § 5 of the Act as another weapon in their arsenal of litigation strategies.

All that injunctions do is to prevent the peoples of the State of Louisiana from electing candidates of <u>their</u> choice in whom they wish to determine matters of liberty and property. Totally lost sight of is the provision concerning these people whose rights would be denied, impaired and otherwise adversely affected. This Congress considered when it provided in 42 § 1973n:

> 42 § 1973n. Impairment of voting rights of persons holding current registration
>
> Nothing in subchapters I-A to I-C of this chapter shall be

> construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State of political subdivision.

All of the above and foregoing is thus respectfully submitted.

/s/ Robert G. Pugh
ROBERT G. PUGH
LA Bar Roll No. 10897

/s/ Robert G. Pugh, Jr.
ROBERT G. PUGH, JR.
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ATTORNEYS FOR CHARLES "BUDDY" ROEMER
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ATTORNEYS FOR THE LOUISIANA
DISTRICT JUDGES ASSOCIATION

[Attached chart and certificate omitted in printing]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

----------x

JANICE G. CLARK, et al.

Plaintiffs,

vs. CIVIL ACTION NO. 86-435-A

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; et al.

Defendants.

----------x

MOTION TO THE THREE-JUDGE COURT TO ENJOIN UNPRECLEARED ELECTIONS IN DISTRICTS 1, 4, 9, 14, 15, 18, 24, 40, AND THE FIRST CIRCUIT, DISTRICT TWO

[Filed October 1, 1990]

The plaintiffs move to enjoin qualification and election for the following judgeships which have not been precleared under Section 5 of the Voting Rights Act (and which previously were the subject of a Section 2 injunction in this case):

DISTRICT	DIVISION
1	F
4	D,F,G
9	D,E
14	E,F,G,H
15	E,F,G,H
18	C
24	H,I,J,K,P
40	C

First Circuit,
District Two

Respectfully Submitted,

/s/ Robert B. McDuff
ROBERT B. MCDUFF
Lawyers' Committee for
Civil Rights Under Law
1400 Eye Street, N.W.,
#400
Washington, D.C. 20005
(202) 371-1212

/s/ Ernest L. Johnson
ERNEST L. JOHNSON
T. RICHARDSON BOBB
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(504) 929-7676

ULYSSES GENE THIBODEAUX
1925 Enterprise Boulevard
Lake Charles, LA 70601
(318) 439-1060

Counsel for Plaintiffs

[certificate omitted in printing]

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
OCTOBER 2, 1990
PARKER, C. J.

JANICE CLARK, ET AL.
CIVIL ACTION
No. 86-435-A
VERSUS

CHARLES "BUDDY" ROEMER, ET AL.

This cause came on this day for oral argument on defendants' motion to dissolve pending injunction.

PRESENT: Ernest Johnson, Esq.
Counsel for plaintiffs

Michael Rubin, Esq.
Counsel for LDJA

Roy Mongrue, Esq.
Counsel for State of Louisiana

Cynthia Rougeou, Esq.
Counsel for Secretary of State

John Kennedy, Esq.
Counsel for Governor

Roemer

Fred Cassibry, Esq.
Jan T. van Loon, Esq.
Counsel for 24th Judicial District Judges

Counsel present their arguments to the court.

Sylvia Cooks, Eddie Crawford and Janice Clark are sworn and testify for plaintiffs.

Plaintiffs rest.

Edward C. Gaudin, Douglas Gonzales and Charles Scott are sworn and testify for defendants.

Defendants rest.

For the reasons read into the record, defendants' motion to dissolve injunction is hereby GRANTED and qualification for the office(s) of judge in those districts shall occur on Wednesday, October 3rd, 1990, Thursday, October 4th, 1990 and

Friday, October 5th, 1990, with the primary election to occur on November 6, 1990 and a runoff election, if necessary, to be held on December 8, 1990.

The court may file written reasons as it deems necessary.

* * * * *

/s/ John V. Parker

RUBIN, CURRY, COLVIN & JOSEPH
A PROFESSIONAL LAW CORPORATION

October 2, 1990

VIA HAND DELIVERY
Honorable John V. Parker, Judge
Honorable Frank J. Polozola, Judge
Federal Courthouse
Baton Rouge, Louisiana

RE: Clark v. Roemer
C.A. 86-435(A)
Three Judge Court
Our File Number: 5998

Dear Judge Parker and Judge Polozola:

Enclosed is the order you asked us to prepare concerning the elections in the 1st, 4th, 9th, 14th, 15th, 18th, 24th, and 40th Judicial Districts and in the First Circuit, District 2, Division C.

In looking at the statute, R.S. 13:312.2, the First Circuit seat started in January 1, 1985. Since the term lasts for ten years, it will not expire until 1994. Since the term will not expire

until 1994, I have taken the liberty of presuming that the Court would not allow qualification for a position that will not open up until 1994; therefore, a separate part of the order addresses this position and enjoins both qualifications and elections. I trust that this meets with the intentions of the Court.

Sincerely,

/s/ Michael H. Rubin
Michael H. Rubin

cc. via FAX to: Ernest Johnson
Robert McDuff
John Kennedy
Roy Mongrue
Cindy Rougeau
Robert Pugh

MHR/ccw

[attachment omitted in printing]

[Exhibit D-1, 9/28/90 hearing]

13 NOV 1979

Kenneth C. DeJean, Esq.
Assistant Attorney General
Post Office Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to the special election for the Tenth Judicial District in Louisiana (Act 635 (1979)), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on September 17, 1979.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not

bar any subsequent judicial action to enjoin the enforcement of such change.

For your guidance in future submissions, we would like to point out that the Procedures for the Administration of Section 5 of the Voting Rights Act (20 C.F.R. 51.5), a copy of which is enclosed, require that submissions to the Attorney General be made in duplicate.

Sincerely,

DREW S. DAYS III
Assistant Attorney
General
Civil Rights Division

GERALD W. JONES
Chief, Voting Section

[Exhibit D-2, 9/28/90 hearing]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

OCT 11 1977

Mr. Kenneth C. DeJean
Assistant Attorney General
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act 164 and Act 620 of the 1977 Regular Session of the Louisiana Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on August 12, 1977.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of

the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

/s/ Gerald W. Jones
By: GERALD W. JONES
Chief, Voting Section

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

August 9, 1977

CERTIFIED-RETURN RECEIPT REQUESTED

Mr. Gerald W. Jones, Chief
Voting Rights Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Jones:

The State of Louisiana hereby submits to the United States Department of Justice certified copies of Act 164 and Act 620.

These acts, which were adopted by the Louisiana Legislature at its Regular Session of 1977, are submitted in accordance with 42 U.S.C. 1973(c) as the acts effect changes with respect to voting in Louisiana.

Any questions that the United States Department of Justice may have concerning

this submission may be directed to me, Kenneth C. DeJean, Assistant Attorney General, Department of Justice, Post Office Box 44005, State Capitol, Baton Rouge, Louisiana, Telephone: (504) 389-6781.

Sincerely,

KENNETH C. DEJEAN
Assistant Attorney
General

DCJ/sds

Enclosures

Certified No. 514477

bcc: Paul J. Hardy, Secretary of State
Camille F. Gravel, Jr., Exec.
Counsel to the Governor
Norma Duncan, Asst. Director,
Legislative Council

[Exhibit D-3, 9/28/90 hearing]

U.S. Department of Justice
Washington, D.C. 20530

2 DEC 1982

Honorable William J. Guste, Jr.
Attorney General
State of Louisiana
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. Attorney General:

This is in reference to Act No. 21 (1982), of the Regular Session of the Louisiana Legislature, which creates additional district court judgeships for Judicial District Nos. 1, 15, 18, 23 and 27, divides the 29th Judicial District so as to create the 40th Judicial District, provides for the election of a district attorney in the 40th Judicial District and provides for the January 15, 1983, special election to be held in that district in the State of Louisiana,

submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on October 15, 1982.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney
General
Civil Rights Division

By: /s/ Carl Gabel

Gerald W. Jones
Chief, Voting Section

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

October 1, 1982

CERTIFIED - RETURN RECEIPT
REQUESTED -

Mr. William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
Voting Rights Section
Department of Justice
Washington, D.C. 20530

Re: Submission of Act 21 of 1982 under Section 5 of the Voting Rights Act 1965

Dear Mr. Reynolds:

The state of Louisiana, through its Attorney General, William J. Guste, Jr., hereby submits Act 21 of the Regular Session of 1982, a duly certified copy of which is attached hereto.

This Act is submitted pursuant to the Voting Rights Act of 1965, Section 5, and in accordance with 28 C.F.R., Part 51, as the Act effects changes with

respect to voting in Louisiana by amending and reenacting certain portions of the Louisiana Revised Statutes. These Sections are:

R.S. 13:447(29)	R.S. 16:641
R.S. 13:621.1	R.S. 16:642
R.S. 13:621.15	R.S. 16:643
R.S. 13:621.18	R.S. 13:447(40)
R.S. 13:621.23	R.S. 16:51(41)
R.S. 13:621.27	R.S. 16:911
R.S. 13:621.29	R.S. 16:912
R.S. 16:51(29)	R.S. 13:621.40

Act 21 was originally introduced in the Louisiana House of Representatives as House Bill 572, and was sponsored by Messrs. Babin, Accardo, Dischler and Miller and Senator Casey. The bill made the following changes:

Prior law provided for judgeship positions in the 1st, 15th, 18th, 23rd, and 27th Judicial Districts.

New law: the "Omnibus Judgeship Act," increases the number of

district judges in various judicial districts, with the first judges to be elected at a special election called by the governor and to take office on January 1, 1983, for a term to expire at the same time as the terms of the other judges, with their successors to be elected at the same time and for the same terms as other district judges:

1st Judicial District, from 8 to 9 judges.

15th Judicial District, from 9 to 10 judges.

18th Judicial District, from 3 to 4 judges.

23rd Judicial District, from 3 to 4 judges.

27th Judicial District, from 3 to 4 judges.

New law authorizes the division of the 29th J.D.C. (St. Charles and St. John the Baptist Parishes) so that St. Charles will compose the 29th J.D.C. and St. John will compose the new 40th J.D.C. effective January 1, 1985, if approved at a referendum election in the two parishes to be held on the third Saturday in January 1983. If approved, the governor shall call an election for a district attorney for the new 40th J.D.C. to coincide with the regular congressional election 1984, with the new D.A. to take office on January 1, 1985. Of the existing judges in the 29th J.D.C., the three domiciled in St. Charles Parish will remain as the judges of the 29th J.D.C. and the two domiciled in

St. John will become the judges for the new 40th J.D.C.

Act 21 of 1982 was finally passed by the Legislature on May 20, by a vote of 94/1 in the House and on June 24, by a vote of 37/0 in the Senate. The Act was signed by Governor David C. Treen on July 9. Generally Act 21 became law pursuant to Article III, Section 18 of the Louisiana Constitution upon the signature of the Governor. However, the provisions of Subsection (h) of Section 6(a) of this Act shall become effective on July 1, 1984, and the provisions of Subsections (a), (b), (c), (d), (e), (f), (g), and (n) of Section 6(a) shall become effective on January 1, 1985, if the proposition submitted to the electors as provided in Subsection (i) of Section 6(a) is approved by the electors. If the

proposition is not approved by the electors, all the provisions of this Section shall expire and be null, void and of no effect. Act 21 is intended to have effect in those parishes enumerated in the Act. The Act is not anticipated to affect adversely any language or racial minority group. This enactment has not yet been enforced.

This office is unaware of any past or pending litigation concerning the change or related voting practices. Prior practices were precleared in a submission dated September 20, 1978, A7300 and October 19, 1981, E0100-0101, E1390-1393, which reference number is the United States Department of Justice file number.

Requests for further information should be directed to the undersigned,

Oliver W. Williams, Staff Attorney, Post Office Box 44005, Baton Rouge, Louisiana 70804; telephone: (504) 342-7013.

Sincerely,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Oliver W. Williams
OLIVER W. WILLIAMS
Staff Attorney

OWW/crw

[Exhibit D-4, 9/28/90 hearing]

U.S. Department of Justice
Washington, D.C. 20530

OCT 19 1981

Kenneth C. DeJean, Esq.
Assistant Attorney General
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 568, H.B. No. 1580 (1981), which provides for the October 17, 1981, referendum election; the creation of an additional judicial district; and the increase in the number of judges for the 16th, 22nd, 24th, and 29th Judicial Districts, in the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on August 18, 1981.

The Attorney General does not interpose any objections to the October 17, 1981, referendum election and the increase in the number of judges for the above-mentioned districts. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

The provision of this Act with respect to the creation of an additional judicial district is viewed as enabling legislation. However, the Attorney General will make no determination with respect to that change since the proposition did not receive voter approval. See Section 51.14 of the Procedures for the Administration of

Section 5 (46 Fed. Reg. 875). Any future attempt to implement this change will be subject to the preclearance requirements of Section 5.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney
General
Civil Rights Division

By: /s/ Carl Gabel
for Gerald W. Jones
Chief, Voting Section

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

August 13, 1981

CERTIFIED - RETURN RECEIPT REQUESTED -

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
Voting Rights Section
Department of Justice
Washington, D.C. 20530

RE: Submission of Act 568 of 1981 under Section 5 of the Voting Rights Act

Dear Mr. Turner:

The State of Louisiana, through its Attorney General, William J. Guste, Jr., hereby submits Act 568 of the Regular Session of the Louisiana Legislature of 1981, a duly certified copy which is attached hereto.

This Act is submitted pursuant to the Voting Rights Act of 1965, Section 5, and in accordance with 28 C.F.R.,

Part 51, as this Act effects changes with respect to voting in the State of Louisiana by amending and reenacting certain portions of the Louisiana Revised Statutes. These Sections are:

R.S. 13:621.16	R.S. 16:434
R.S. 13:621.22	R.S. 13:477(40)
R.S. 13:621.24	R.S. 13:621(40)
R.S. 13:621.29	R.S. 16:51
R.S. 13:477(20)	R.S. 16:911
R.S. 16:51(20)	R.S. 16:912
R.S. 16:431	R.S. 16:913
R.S. 16:432	R.S. 16:914
R.S. 16:433	

Act 568 was originally introduced in the Louisiana House of Representatives as House Bill 1580. The bill was sponsored by Representative Simoneaux and Senators Casey, Accardo, Alario, Charbonnet, D'Gerolamo, Dimos, Ensminger, Sour, and Weaver. The bill makes the following changes:

The "Omnibus Judgeship" bill provides for the following additional judgeships,

effective on the signature of the governor, to take office on January 1, 1982, to wit:

(a) Increases <u>from</u> five <u>to</u> six the judges in the 16th Judicial District (Iberia, St. Martin, and St. Mary Parishes).

(b) Increases <u>from</u> five <u>to</u> six the judges in the 22nd Judicial District (Washington and St. Tammany Parishes).

(c) Increases <u>from</u> thirteen <u>to</u> fifteen the judges in the 24th Judicial District (Jefferson Parish).

(d) Increases <u>from</u> four <u>to</u> five the judges in the 29th Judicial District (St. Charles and St. John the Baptist Parishes).

<u>New law</u> creates a new judicial district out of the present 20th Judicial

District, composed of the parishes of East and West Feliciana. If approved by a voter referendum in October, 1981, the 20th Judicial District will be composed of West Feliciana, effective March 1, 1982. If the referendum is approved, there will be a special election in January, 1982 to elect a judge for the new district, and a district attorney for the 20th Judicial District. The present district attorney for the 20th Judicial District will become the district attorney for the new district on March 1, 1982. The proposed law will reduce <u>from</u> two <u>to</u> one the assistant district attorneys for the 20th Judicial District, and creates one assistant district attorney for the new district.

<u>New law</u> provides that the district attorney for the new district will

receive $3,500/year from the parish of West Feliciana and the assistant district attorney will receive not in excess of $1,000/year.

This Act was adopted by the Louisiana Legislature pursuant to its general legislative powers provided in Article III, Section 1 of the Louisiana Constitution of 1974 and the Constitution of the United States of America, Amendment X.

Act 568 of 1981 was finally passed by the Legislature on June 18, 1981, by a vote of 83 - 3 in the House of Representatives and on July 7, 1981, by a vote of 38 - 0 in the Senate. House Bill 1580 was signed by Governor David C. Treen on July 20, 1981. Under the terms of Section 6 of the Act, the Act became effective upon signature of the Governor.

However, Section 911(j) and (k) of Act 568 specify a later effective date for certain portions of the Act. This enactment has not yet been enforced. Act 568 is intended to have effect in those parishes enumerated in the Act (Iberia, St. Martin, St. Mary, Washington, St. Tammany, Jefferson, St. Charles, and St. John the Baptist). The Act is not anticipated to affect adversely any language or racial minority group.

This office is unaware of any past or pending litigation concerning the change or related voting practices. Prior practices were not precleared because they antedated the operative date of the 1965 Voting Rights Act, although some provisions by the United States Attorney General in submission A-2029-2030, A7300, and C6386. These references

are to the United States Department of Justice file numbers.

Request for further information should be directed to the undersigned, Kenneth C. DeJean, Assistant Attorney General, Post Office Box 44005, Baton Rouge, Louisiana 70804, telephone: (504) 342-7013.

Sincerely,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Kenneth C. DeJean
KENNETH C. DEJEAN
Assistant Attorney General

KCK:CDY:lg
Attachment

UNITED STATES OF AMERICA
STATE OF LOUISIANA
JAMES H. "JIM" BROWN
SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that the annexed and following pages contain a true and correct copy of Act No. 568 of the 1981 Regular Session of the Louisiana Legislature as shown by comparison with the original on file in the archives of this office.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on

this the 28th day of July, 1981.

/s/ Jim Brown
Secretary of State

* * *

AN ACT

To amend the reenact Sections 621.16, 621.22, 621.24, and 621.29 of Title 13, the initial paragraph and Paragraph (20) of Section 477 of Title 13, Paragraph (20) of Section 51 of Title 16, and Sections 431, 432, 433, and 434 of Title 16, to amend Section 477 of Title 13 by adding thereto a new Paragraph, to be designated as Paragraph (40), to amend Title 13 by adding thereto a new Section to be designated as Section 621.40, to amend Section 51 of Title 16 by adding thereto a new Paragraph, to be designated as Paragraph (40), and to amend Title 16 by adding thereto a new Part to be designated as Part XXXVI of Chapter 2 to

be comprised of Sections 911, 912, 913, and 914; all Titles of the Louisiana Revised Statutes of 1950, relative to the establishment of additional offices of judges, district attorneys, assistant district attorneys, and new judicial divisions, to provide for the modification of the number of judgeships in the Sixteenth, Twenty-Second, Twenty-Fourth, and Twenty-Ninth Judicial Districts, to provide for the creation of a new judicial district out of the Twentieth Judicial District, to provide for a district attorney and assistant district attorneys for the Twentieth Judicial District and new judicial district; to provide for a judgeship for the new judicial district; to provide for a judgeship for the new judicial

district, and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1(a). Section 621.16 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read a follows:

§621.16. Sixteenth Judicial District

The Sixteenth Judicial District shall have six judges.

(b). There is hereby created an additional office of district judge for the Sixteenth Judicial District Court for the parishes of Iberia, St. Martin, and St. Mary.

For purposes of nomination and election only, there is hereby created in

the Sixteenth Judicial District one new division, to be designated as Division F.

The additional judge herein provided for shall be elected at large from the Sixteenth Judicial District and shall have jurisdiction throughout the district and shall be elected by the qualified electors of the district.

* * *

The first judge to be elected to the additional judgeship shall be elected as provided by Article V, Section 22 of the Constitution. He shall take office on January 1, 1982 and shall serve for a term that shall expire at the same time as is provided by law for the other judges of the court. Thereafter, the successors to the additional judgeship provided for by this Section shall be elected at the same time and in the same

manner and shall serve the same term as is now or may be hereafter provided for other judges of the district.

Section 2(a). Section 621.22 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§621.22. Twenty-Section Judicial District

The Twenty-Section Judicial District shall have six judges.

(b). There is hereby created an additional office of district judge for the Twenty-Second Judicial District Court for the parishes of Washington and St. Tammany.

For purposes of nomination and election only, there is hereby created in the Twenty-Second Judicial District one

new division, to be designated as Division F.

The additional judge herein provided for shall be elected at large from the Twenty-Section Judicial District and shall have jurisdiction throughout the district and shall be elected by the qualified electors of the district.

* * *

The first judge to be elected to the additional judgeship shall be elected as provided by Article V, Section 22 of the Constitution. He shall take office on January 1, 1982 and shall serve for a term that shall expire at the same time as is provided by law for the other judges of the court. Thereafter, the successors to the additional judgeship provided for by this Section shall be elected at the same time and in the same

manner and shall serve the same term as is now or may be hereafter provided for other judges of the district.

Section 3(a). Section 621.24 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§621.24. Twenty-Fourth Judicial District

The Twenty-Fourth Judicial District shall have fifteen judges.

(b). There are hereby created two additional offices of district judge for the Twenty-Fourth Judicial District Court for the parish of Jefferson.

For purposes of nomination and election only, there are hereby created in the Twenty-Fourth Judicial District two new divisions, to be designated as Division N and Division O.

The additional judges herein provided for shall be elected at large from the Twenty-Fourth Judicial District and shall have jurisdiction throughout the district and shall be elected by the qualified electors of the district.

* * *

The first judge to be elected to each additional judgeship shall be elected as provided by Article V, Section 22 of the Constitution. He shall take office on January 1, 1982 and shall serve for a term that shall expire at the same time as is provided by law for the other judges of the court. Thereafter, the successors to each additional judgeship provided for by this Section shall be elected at the same time and in the same manner and shall serve the same term as

is now or may be hereafter provided for other judges of the district.

Section 4(a). The initial paragraph and Paragraph (20) of Section 477 of Title 13 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted, and Paragraph (40) of said Section 477 is hereby enacted, all to read as follows:

§477. Judicial districts

There shall be forty judicial districts in the state, the parish of Orleans excepted, and each district shall be composed as follows:

* * *

(20) The parish of East Feliciana shall compose the Twentieth District.

* * *

(40) The parish of West Feliciana shall compose the Fortieth District.

(b). Section 621.40 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§621.40. Fortieth Judicial District

The Fortieth Judicial District Court shall have one judge.

* * *

(f). There is hereby established the office of judge for the Fortieth Judicial District Court, to be composed of the parish of West Feliciana as provided in this Section.

The judge herein provided for shall be elected at large from the parish of West Feliciana.

* * *

(g). The governor, within fifteen days after the effective date of this Subsection, shall call a special election, to be held on the third Saturday in October of 1981 as provided in R.S. 18:402(F)(4), to submit to a vote of the electors of the existing Twentieth Judicial District, being the parishes of East Feliciana and West Feliciana, for their approval or disapproval as provided in Section 15 of Article V of the Louisiana Constitution, the following proposition in substantially the following form:

FOR the proposition that the Twentieth Judicial District be divided, effective March 1, 1982, by the establishment of the Fortieth Judicial District composed of West Feliciana Parish, and continuing the

Twentieth Judicial District composed of East Feliciana Parish as provided by Act No. _____ of the 1981 Regular Session of the Louisiana Legislature.

and also:

AGAINST the proposition that the Twentieth Judicial District be divided, effective March 1, 1982, by the establishment of the Fortieth Judicial District composed of West Feliciana Parish, and continuing the Twentieth Judicial District composed of East Feliciana Parish as provided by Act No. ____ of the 1981 Regular Session of the Louisiana Legislature.

The secretary of state shall fill in the number of this Act in the Propositions.

The special election provided for in this Subsection shall be conducted in accordance with law.

(h). If the proposition submitted to the electors as provided for in Subsection (g) of this Section is approved by the electors then:

i. On and after March 1, 1982, the Twentieth and Fortieth Judicial Districts shall be composed as is provided in Subsection (a) of this Section.

ii. The governor, within fifteen days after the date the results of the referendum provided for in Subsection (g) of this Section become official as provided in Section 575 of the Louisiana Election Code, shall call special elections for the purposes of electing a judge for the Fortieth Judicial District and a district attorney for the Twentieth

Judicial District. The primary elections shall be held on the second Saturday in January, 1982, and the general elections shall be held on the sixth Saturday after the second Saturday in January, 1982. The elections herein provided for shall be conducted in accordance with law. The governor shall fix the opening and closing dates of the qualification periods for candidates.

iii. The judge and district attorney elected at the special elections herein provided for shall take office on March 1, 1982, and shall serve for the terms which shall expire at the same time as the terms provided by law for judges of district courts and for district attorneys throughout the state.

iv. The successors to the officers elected at the special elections provided

for in this Section shall be elected at large from the parish composing their judicial district at the same time and in the same manner as is provided by law for the election of such officers throughout the state.

v. The judge of the Twentieth Judicial District holding office on the effective date of this Subsection shall continue to serve as judge for that district until March 1, 1982. On and after March 1, 1982, he shall serve as the judge for the Twentieth Judicial District until his term expires. Thereafter, the judge for the Twentieth Judicial District shall be elected at large from the parish of East Feliciana at the same time and in the same manner as is provided by law for the election of

judges of district courts throughout the state.

* * *

(i). In the event more than one judicial district is established by authority of legislation passed at the 1981 Regular Session of the louisiana Legislature, and two or more of such newly established districts are designated by the same number, the secretary of state is hereby authorized and directed to assign consecutive numbers to the newly established judicial districts, commencing with the Fortieth Judicial District, and to designate properly on the ballot provided for in Subsection (g) of this Section the number of the new district created under the provisions of this Section.

(j). If the secretary of state changes the number of any new judicial district established a the 1981 Regular Session of the Louisiana Legislature by virtue of his authority under Subsection (i) of this Section, the Louisiana State Law Institute shall make necessary changes in applicable statutes, in order that all references to such judicial districts correspond to the number designation assigned to such judicial districts by the secretary of state.

(k). The provisions of Subsections (g), (h), (i), (j), and (k) of this Section shall become effective upon signature by the governor or, if not signed or vetoed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III,

Section 18 of the Constitution. The provisions of Subsection (f) of this Section shall become effective on September 1, 1981, and the provisions of Subsection (a), (b), (c), (d), and (e) of this Section shall become effective on March 1, 1982, if the proposition submitted to the electors as provided in Subsection (g) of this Section is approved by the electors. If the proposition is not approved by the electors, the provisions of this Section shall expire and be null, void, and of no effect.

Section 5 (a). Section 621.29 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§621.29. Twenty-Ninth Judicial District

The Twenty-Ninth Judicial District Court shall have five judges.

(b). For purposes of nomination and election only, there is hereby created in the Twenty-Ninth Judicial District one new division, to be designated as Division E.

There is hereby created an additional office of district judge for the Twenty-Ninth Judicial Court for the parishes of St. Charles and St. John the Baptist.

The additional judge herein provided for shall have jurisdiction throughout the district and shall be elected by the qualified electors of the district.

* * *

The first judge to be elected to the additional judgeship shall be elected as provided by Article V, Section 22 of the

constitution. He shall take office on January 1, 1982 and shall serve for a term which shall expire at the same time as is provided by law for the other judges of the court. Thereafter, the successors to the additional judgeship provided for by the Section shall be elected at the same time and in the same manner and shall serve the same term as is now or may be hereafter provided for other judges of the district.

* * *

Section 8. All laws or parts of laws in conflict herewith are hereby repealed.

/s/ John J. Hainkel, Jr.
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ Michael H. O'Keefe
PRESIDENT OF THE SENATE

/s/ David C. Treen
GOVERNOR OF THE STATE OF
LOUISIANA

APPROVED: 7/20/81

[Exhibit D-5, 9/28/90 hearing]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SEP 20 1978

Mr. Kenneth DeJean
Assistant Attorney General
State of Louisiana
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 39 of the 1978 Regular Session of the Legislature of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on July 26, 1978.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney

General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

DREW S. DAYS III
Assistant Attorney
General
Civil Rights Division

By: /s/ Gerald W. Jones
GERALD W. JONES
Chief, Voting Section

State of Louisiana
Department of Justice
Baton Rouge
70804

July 24, 1978

CERTIFIED-RETURN RECEIPT REQUESTED

Mr. Gerald W. Jones, Chief
Voting Rights Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Jones:

The State of Louisiana hereby submits to the United States Department of Justice certified copies of:

Act 14	Act 202	Act 453
Act 38	Act 206	Act 494
Act 39	Act 215	Act 503
Act 56	Act 246	Act 506
Act 62	Act 292	Act 534
Act 137	Act 296	Act 554
Act 145	Act 298	Act 580
Act 178	Act 316	Act 720
Act 185	Act 419	Act 721
Act 201	Act 429	

Senate Concurrent Resolution No. 35

These acts and resolution, which were adopted by the Louisiana Legislature at its Regular Session of 1978, are

submitted in accordance with 42 U.S.C. 1973(c) as the acts effect changes with respect to voting in Louisiana.

Any questions that the United States Department of Justice may have concerning this submission may be directed to me, Kenneth C. DeJean, Assistant Attorney General, Department of Justice, Post Office Box 44005, State Capitol, Baton Rouge, Louisiana, 70804, Telephone: (504) 342-7013.

Sincerely,

/s/ Kenneth C. DeJean
KENNETH C. DEJEAN
Assistant Attorney General

KCD:vb
Enclosures

[Exhibit D-6, 9/28/90 hearing]

U.S. Department of Justice
Washington, D.C. 20530

August 26, 1981

Mr. Kenneth DeJean
Assistant Attorney General
State of Louisiana
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 3 of the 1981 Regular Session of the Louisiana Legislature, which provides additional appellate court judges and a special election in October 1981, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on August 4, 1981. In accordance with your request expedited consideration has been given this submission pursuant to Section 51.32

of the Procedures for the Administration of Section 5 (46 Fed. Reg. 877).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Carl Gabel
for Gerald W. Jones
Chief, Voting Section

State of Louisiana
Department of Justice
Baton Rouge
70804

July 29, 1981

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
Voting Rights Section
Department of Justice
Washington, D.C. 20530

RE: Submission of Act 3 of 1981 under Section 5 of Voting Rights Act

Dear Mr. Turner:

The State of Louisiana, through its Attorney General, William J. Guste, Jr., hereby submits Act 3 of the Regular Session of the Louisiana Legislature of 1981, a duly certified copy of which is attached hereto.

This Act is submitted pursuant to the Voting Rights Act of 1965, Section 5, and in accordance with 28 C.F.R., Part 51, as this Act effects changes with

respect to voting in the State of Louisiana Revised Statutes. Those sections are: R.S. 13:312, R.S. 13:312.1, R.S. 13:321, and R.S. 13:353.

Act 3 was originally introduced in the Louisiana Senate as Senate Bill 170. The purpose of the bill is to assist in facilitating changes in appellate jurisdiction of the Louisiana Supreme Court and the Louisiana Circuit Courts of Appeal. Prior to 1980, the Louisiana Courts of Appeal had no criminal jurisdiction. However, by reason of Act 843 of 1980, approved by the Louisiana electorate on November 4, 1980, as an amendment to the Louisiana Constitution, effective July 1, 1982 appellate jurisdiction in criminal matters will be vested in the Louisiana Courts of Appeal. With the change in the appellate

jurisdiction of the Courts of Appeal, the Legislature recognized the need for additional judgeships to handle the additional criminal appeal workload that these courts will assume and accordingly, Act 3 made the following changes:

New law, relative to the courts of appeal, basically provides for the creation of a Fifth Circuit, out of the present Fourth Circuit, and also increases the number of appellate judges from 33 to 48 throughout the state.

New law creates the court of appeals for the Fifth Circuit out of the present Fourth Circuit. The chart below shows the number of judges and arrangement of districts in the prior law, Act 661 of 1980, and the new law to wit:

	PRIOR LAW		ACT 661, 1980 R.S.		NEW LAW	
1.	First Circuit					
	Districts	Judges	Districts	Judges	District	Judges
1st -	Ascension, Assumption Iberville, Lafourche, Pointe Coupee, St. Mary, Terrebonne, and West Baton Rouge	3	1st - (Same)	3	1st - (Same)	4
2nd -	East Baton Rouge	3	2nd - (Same)	3	2nd - (Same)	4
3rd -	East Feliciana, Livingston, St. Helena, St. Tammany, Tangipahoa, Washington, and West Feliciana	3	3rd - (Same) At Large	3 1	3rd - (Same)	4
Total		9	Total	10	Total	12
2.	Second Circuit					
	Districts					
1st -	East Carroll, Franklin Madison, Morehouse, Ouachita, Richland, Tensas, and West Carroll	1	1st - (Same)	1	1st - (Same)	2
2nd -	Bienville, Bossier, Caldwell, Claiborne, Jackson, Lincoln, Union Webster, and Winn	1	2nd - (Same)	1	2nd - (Same)	2
3rd -	Caddo, DeSoto, and Red River	1	3rd - (Same)	1	3rd - (Same)	2
At Large		2	At Large	3	At Large	1
Total		5	Total	6	Total	7
3.	Third Circuit (No Change by new law)					
	Districts					
1st -	Avoyelles, Catahoula, Concordia, Grant,		1st - (Same)	2	1st - (Same)	2

	LaSalle, Natchitoches, Rapides, and Sabine	2	
2nd -	Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vernon	2	2nd - (Same) 2 — 2nd - (Same) 2
3rd -	Acadia, Evangeline, Iberia, Lafayette, St. Martin, St. Landry, and Vermilion	2	3rd - (Same) 2 — 3rd - (Same) 2
At Large		3	At Large 3 — At Large 3
Total		9	Total 9 — Total 9
4.	Fourth Circuit		
	Districts		
1st -	Jefferson	2	1st - Orleans 8 — 1st - Orleans 8
2nd -	Orleans	5	2nd - Plaquemines 1 — 2nd - Plaquemines 1
3rd -	St. Charles, St. James, St. John the Baptist	1	3rd - St. Bernard 1 — 3rd - St. Bernard 1
4th -	Plaquemines and St. Bernard	1	
From combined 1st, 3rd, and 4th districts		1	
Total		10	Total 10 — Total 12
5.	Fifth Circuit (New)		
	1st -	Jefferson	1 — 1st - (Same) 6 (7)
	2nd -	St. James, St. John the Baptist (east of the Mississippi)	1 — 2nd - (Same) 1
	3rd -	St. Charles, St. John the Baptist (west of the Mississippi)	1 — 3rd - (Same) 1
			Total 6 — Total 8 (9)
TOTAL		33	TOTAL 41 — TOTAL 48 (49)

An additional judge for the first district exists until January 1, 1983.

. . .

Act 661 of 1980 would create the additional judgeships shown on the chart effective December 1, 1981.

New law repeals the above digested provisions of Act 661 which are to be effective December 1, 1981, except that it retains the provisions of Act 661 which created one additional judgeship for the Fourth Circuit. That judgeship has been filled. (Effective on signature of the governor).

Prior law provided that a sheriff's deputy shall attend each session of court for the First, Second, and Third Circuits. The Fourth Circuit is attended

by the New Orleans police. New law adds sheriffs' deputies for the Fifth Circuit. (Effective may 1, 1982).

New law provides that all additional judgeships shall be established as soon as this Act is signed by the governor. Provides for a special election by special primary on the third Saturday in October and special general election on the sixth Saturday following the third Saturday in October. The new judges for the First, Second, and Fourth Circuit take office on January 1, 1982; the judges for the Fifth Circuit take office May 1, 1982. The new judges for the "new" Fourth Circuit will be elected to districts of the "old" Fourth Circuit, take office on January 1, 1982, and be

transferred to the "new" Fourth Circuit on May 1, 1982.

Provides that nine judgeships shall be established for the Fifth Circuit until January 1, 1983. Provides that seven of the judges shall be elected from the first district of the Fifth Circuit. Provides that one judgeship from the first district shall be abolished on January 1, 1983 (when the incumbent judge's term expires). Provides that four of the nine judges are incumbent judges, the remaining five additional judges shall be selected as follows: one from the third district, and four from the first district of the Fifth Circuit.

Prior law provided for alphabetical divisions (A, B, C,....) within each

district of the First Circuit. New law provides the same for all court of appeal circuits. (Effective on the signature of the governor).

Effective dates

(a) On Act's signature by governor - establishment of all judgeships.

(b) May 1, 1982 - creation of the Fifth Circuit.

(c) On signature of the governor - all other provisions.

Act 3 was adopted by the Louisiana Legislature pursuant to its general legislative powers provided in Article III, Section 1 of the Louisiana Constitution of 1974 and the Constitution of the United States of America, Amendment X.

Act 3 was finally passed by the Legislature on May 27, 1981, when the Louisiana Senate concurred in House amendments by a vote of 33 - 0. The House of Representatives had previously adopted the bill by a vote of 77 - 1 on May 2, 1981. The Act was signed by Governor David C. Treen on June 2, 1981.

Section 13 of the Act provides with respect to the effective date of the various sections of Act 3. In accordance with the mandate of Act 3, Governor Treen has issued an Executive Proclamation calling for elections to fill the newly created judgeships which are scheduled to be conducted on October 17, 1981 and November 28, 1981 for the primary and general elections, respectively. A copy of this proclamation is enclosed. Due to these impending elections, the State of

Louisiana requests expedited consideration.

The Act will be effective with respect to only those portions of the State of Louisiana where additional Court of Appeal judgeships have been created, and it is not anticipated that the Act will affect adversely any language or racial minority group.

An action entitled Elmer Tapper v. David C. Treen, Governor of Louisiana, was filed in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, relative to the implementation of Act 3. A copy of the Plaintiff's petition is included, although Mr. Tapper has voluntarily dismissed his petition as of July 22, 1981. The prior practices were precleared by the United States Attorney

General in a letter dated August 28, 1980, a copy of which is attached hereto.

Requests for further information should be directed to the undersigned, Kenneth C. DeJean, Assistant Attorney General, Post Office Box 44005, Baton Rouge, Louisiana 70804, telephone: (504) 342-7013.

Sincerely,

WILLIAM J. GUSTE, JR.
Attorney General

By: /s/ Kenneth C. DeJean
KENNETH C. DEJEAN
Assistant Attorney General

KCD:lg
Enclosures (4)

UNITED STATES OF AMERICA

STATE OF LOUISIANA

JAMES H. "JIM" BROWN
SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that the annexed and following pages contain a true an correct copy of Act No. 3 of the 1981 Regular Session of the Louisiana Legislature as shown by comparison with the original on file in the archives of this office.

In testimony whereof I have hereunto set my hand and caused the seal of my office to be affixed at the City of Baton Rouge on July 1, 1981

/s/ Jim Brown
SECRETARY OF STATE

AN ACT

To amend and reenact the introductory paragraph and Paragraph (4) of Section 312, Subsections A, B, and D of Section 312.1, Section 321, and Subsection B of Section 353 all of Title 13 of the Louisiana Revised Statutes of 1950; to amend Section 312 of said Title by adding thereto a new Paragraph to be designated as Paragraph (5) thereof; to amend Section 312.1 of said Title by adding thereto a new Subsection to be designated as Subsection E thereof; to repeal Sections 1, 2, 3, 4, 5, and 5 of Act 661 of the 1980 Regular Session, relative to the courts of appeal; to provide for judges, districts, divisions, the

fifth circuit; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. The introductory paragraph and Paragraph (4) of Section 312, Subsection D of Section 312.1, and Subsection B of Section 353 of Title 13 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted, and Paragraph (5) of Section 312, and Subsection E of Section 312.1, of said Title are hereby enacted to read as follows:

§312. Courts of appeal; circuits and districts

There shall be five court of appeal circuits, which shall

be subdivided into districts as follows:

* * *

4. (a) Fourth Circuit. The parishes of Orleans, Plaquemines, and St. Bernard shall compose the fourth circuit, and the court of appeal for that circuit shall be known as "Court of Appeal, Fourth Circuit, State of Louisiana."

(b) Districts of the fourth circuit. The parish of Orleans shall compose the first district of the fourth circuit; the parish of Plaquemines shall compose the second district of the fourth circuit; and the parish of St. Bernard shall compose the third district of the fourth circuit.

5. (a) Fifth Circuit. The parishes of Jefferson, St. Charles, St. James, and St. John the Baptist shall compose the fifth circuit and the court of appeal for that circuit shall be known as "Court of Appeal, Fifth Circuit, State of Louisiana."

(b) Districts of the fifth circuit. The parish of Jefferson shall compose the first district of the fifth circuit. The parish of St. James and that portion of St. John the Baptist Parish east of the Mississippi River shall compose the second district of the fifth circuit. The parish of St. Charles and that portion of St. John the Baptist parish west of the Mississippi River shall compose the third district of the fifth circuit.

§312.1. Circuit courts of appeal, domicile, number of judges; election

* * *

D. The Court of Appeal for the Fourth Circuit, domiciled in the city of New Orleans, shall have twelve judges. Eight judges shall be elected from the first district of the fourth circuit by the qualified electors thereof. One judge shall be elected from the second district by the qualified electors thereof. One judge shall be elected from the third district by the qualified electors thereof. Two judges shall be elected from the circuit at large by the qualified electors thereof.

E. The Court of Appeal for the Fifth Circuit, domiciled in the city of Gretna shall initially be composed of nine judges. On January 1, 1983 and thereafter, the court of appeal for the fifth circuit shall have eight judges. Seven judges initially shall be elected from the first district of the fifth circuit. Effective January 1, 1983, six judges shall be elected from the first district of the fifth circuit by the qualified electors thereof. One judge shall be elected from the second district of the fifth circuit by the qualified electors thereof. One judge shall be elected from the third district of the fifth circuit by the qualified voters thereof.

* * *

Section 2. The Court of Appeal, Fourth Circuit shall be composed of the parishes and with the districts as provided in Section 1 of this Act.

The Court of Appeal, Fifth Circuit is hereby established and shall be composed of the parishes and with the districts as provided in Section 1 of this Act.

Section 3. Section 321 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§321. Divisions of the districts of the courts of appeal

A. For the purpose of nomination and election only, there shall be separate and distinct divisions within each

district of the various courts of appeal.

For the purposes of this Section, the word "district" shall include not only those districts provided for in R.S. 13:312, but also, any combination of those districts with regard to those judgeships to be filled by election at large throughout the said combination, and any court of appeal circuit with regard to those judgeships to be filled by election from the circuit at large.

B. The divisions provided for in Subsection A of this Section shall be designated alphabetically as division "A",

division "B", division "C", etc. The judge senior in point of continuous service shall preside over division A, and the other judges of the district shall occupy the other designated divisions according to their respective periods of continuous service. In the event two or more judges in a district shall have served continuously the same length of time, the judge senior in age shall occupy the division first in alphabetical order of the divisions in question.

C. A candidate for nomination and election to a judgeship of any such court of appeal, at the time of filing

his declaration as a candidate therefor, shall designate only one division of the district of the court for the judgeship for which he is a candidate. All nominating and election officials and other persons provided for by law shall provide for the execution of this Section.

D. The divisions of the districts of the courts of appeal shall be determined on July 31, 1981 in accordance with the provisions of this Section. Thereafter, the establishment of any additional court of appeal judgeship shall automatically operate to create an additional division within the district

wherein the additional judgeship is established. The additional divisions shall be given alphabetical designation in the order of their establishment. The successor to any judge in a district shall occupy the same division as his predecessor.

E. Notwithstanding any provisions of this Section to the contrary, those judges of the court of appeal of the first circuit holding office on July 31, 1981 shall continue to occupy their respective divisions in accordance with Act 305 of the 1975 Regular Session of the Legislature. After July 31, 1981 additional divisions shall be created in accordance

with the provisions of this Section.

Section 4. Each judge of the court of appeal for the Fourth Circuit shall, on May 1, 1982, become a judge from the district of the circuit, as that circuit is composed in Section 1 of this Act, in which the parish of his domicile, at the time he was elected to office, lies; and shall serve as a judge from that district until the end of his term. Thereafter, the judge for each respective office shall be elected from the respective district by the qualified electors thereof.

Notwithstanding other provisions of this Section, those said judges who were elected from the combined second, fourth, and fifth districts of the fourth circuit

shall on and after May 1, 1982 serve as judges from the fourth circuit at large until the end of their respective terms. Thereafter, their successors shall be elected from the circuit at large by the qualified electors thereof.

Section 5. (a). The office of judge for the Court of Appeal for the Second Circuit, the judge of which office was elected from the circuit at large by its qualified electors and whose term expires on December 31, 1990, shall hereafter be a division of the second district of the second circuit.

(b) The judge holding the office described in Subsection A of this Section on the effective date of this Section shall continue to serve as judge for the said office until his term expires. Thereafter, or in the event the office

becomes vacant, the judge for the said office shall be elected from the second district of the circuit by the qualified electors thereof.

Section 6. (a). Subsection A of Section 312.1 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§312.1 Circuit Courts of appeal, domicile, number of judges; election

A. The Court of Appeal for the First Circuit, domiciled in the city of Baton Rouge, shall have twelve judges. Four judges shall be elected from each of the three districts composing the circuit by the qualified electors of each district, respectively.

* * *

(b). There are hereby established three additional offices of judge for the Court of Appeal for the First Circuit, to increase the number of judges for the court of appeal for said circuit from nine to twelve judges. One additional judge provided for in this Subsection shall be elected from each district of the circuit by the qualified electors of each respective district.

The initial term of office of each additional judge provided for in this Section shall begin on January 1, 1982. The initial term of office for each newly elected judge shall expire on December 31, 1990.

The first judge to be elected to each additional office shall be elected at a special primary election as provided by Article V, Section 22 of the

constitution. The governor shall call the special primary election for the third Saturday in October 1981, and the special general election for the sixth Saturday after the third Saturday in October, 1981.

The successors to each additional office of judge herein provided, after the initial term of office, shall be elected for terms of ten years.

Each additional judge shall receive the same compensation, expenses, and emoluments of office as are now or hereafter provided by law for the other judges of the circuit.

Section 7. (a). Subparagraph (b) of Paragraph 4 of the Section 312 and Subsection D of Section 312.1 of Title 13 of the Louisiana Revised Statutes of 1950

are hereby amended and reenacted to read as follows:

§312. Courts of appeal; circuits and districts

There shall be four court of appeal circuits, which shall each be subdivided into districts as follows:

* * *

4.

* * *

(b) Districts of fourth circuit. The parish of Jefferson shall compose the first district of the fourth circuit; the parish of Orleans shall compose the second district of the fourth circuit; the parishes of St. Charles, St. James, and St. John the Baptist shall compose the third district of the

fourth circuit; the parish St. Bernard shall compose the fourth district of the fourth circuit; and the parish of Plaquemines shall compose the fifth district of the fourth circuit.

§312.1. Circuit courts of appeal; domicile; number of judges; election

* * *

D. The Court of Appeal for the Fourth Circuit, domiciled in the City of New Orleans, shall have sixteen judges. One judge shall be elected from the combined first, third, fourth and fifth districts of the circuit by the qualified electors thereof. Two judges shall be elected from the first district of the circuit by the qualified

electors thereof. Eight judges shall be elected form the second district of the circuit by the qualified electors thereof. One judge shall be elected from the fourth district of the circuit by the qualified electors thereof. Two judges shall be elected to the combined second, fourth and fifth districts of the circuit by the qualified electors thereof. One judge shall be elected from the fifth district of the circuit by the qualified electors thereof.

* * *

(b). There are hereby established six additional offices of judge for the Court of Appeal for the Fourth Circuit, to increase the number of judges for the court of appeal for said

circuit from ten to sixteen judges. Three of the additional judges provided for in this Subsection shall be elected from the second district of the circuit by the qualified electors of the district. Two of the additional judges shall be elected from the combined second, fourth and fifth districts of the circuit by the qualified electors thereof. One of the additional judges shall be elected from the fifth district of the circuit by the qualified electors thereof.

The initial term of office of each additional judge provided for in this Section shall begin on Jan. 1, 1982. The initial term of office for each newly elected judge shall expire on December 31, 1990.

The first judge to be elected to each additional office shall be elected at a special election as provided by Article V, Section 22 of the Constitution. The governor shall call the special primary election for the third Saturday in October, 1981 and the special general election for the sixth Saturday after the third Saturday in October, 1981.

The successors to each additional office of judge herein provided, after the initial term of office, shall be elected for terms of ten years.

Each additional judge shall receive the same compensation, expenses and emoluments of office as are now or hereafter provided by law for the other judges of the circuit.

Section 8. (a). Subsection B of Section 312.1 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§312.1 Circuit courts of appeal, domicile, number of judges; election

* * *

B. The Court of Appeal for the Second Circuit, domiciled in the city of Shreveport, shall have seven judges. One judge shall be elected from the circuit at large by the qualified electors thereof. Two judges shall be elected from each of the three districts composing the circuit by the qualified electors of each district, respectively.

* * *

(b). There are hereby established two additional offices of judge for the Court of Appeal for the Second Circuit, to increase the number of judges for the court of appeal for said circuit from five to seven judges. One of the additional judges shall be elected from the first district of the circuit by the qualified electors thereof. One of the additional judges shall be elected from the third district of the circuit by the qualified electors thereof.

The initial term of office of each additional judge provided for in this Section shall begin on January 1, 1982. The initial term of office for each newly elected judge shall expire on December 31, 1990.

The first judge to be elected to each additional office shall be elected

at a special election as provided by Article V, Section 22 of the constitution. The governor shall call the special primary elections for the third Saturday in October, 1981 and the special general election for the sixth Saturday after the third Saturday in October, 1981 and the special general election for the sixth Saturday after the third Saturday in October, 1981. The successors to each additional office of judge herein provided, after the initial term of office, shall be elected for terms of ten years.

Each additional judge shall receive the same compensation, expenses, and emoluments of office as are now or hereafter provided by law for the other judges of the circuit.

Section 9. (a). There are hereby established twelve offices of judge for the Court of Appeal for the Fourth Circuit as that circuit and its districts are composed in Section 1 of this Act, which shall be filled by incumbent judges in accordance with the provisions of Section 4 of this Act.

(b). Notwithstanding the provisions of R.S. 13:321 or other provisions of law, for purposes of nomination and election only, the first district of the Court of Appeal of the Fourth Circuit, as composed in Section 1 of this Act, shall have eight divisions which shall be designated as Divisions A, B, C, D, E, F, G, and H. The judges who hold office and are domiciled in the first district of the circuit as composed in Section 1 of this Act, on the

effective date of this Section, shall occupy Divisions A through E. The judge having the greatest seniority shall occupy Division A, the judge having the next greatest seniority, Division B, and so on through C, D, and E. Whenever a judge is appointed or elected to succeed a judge of a division, that division shall remain the same without regard to the seniority of any of the judges of the district. The additional judges provided for the said circuit by this Act shall occupy the remaining divisions. Hereafter additional divisions within the circuit shall be created in accordance with R.S. 13:321.

Section 10. (a). There are hereby established nine offices of judge for the Court of Appeal for the Fifth Circuit as the circuit and its districts are

composed in Section 1 of this Act. Since four of the nine offices of judge provided for in this Subsection will be filled by incumbent judges in accordance with the provisions of Section 4 of this Act, the remaining five are additional offices and the additional judges thereof shall be elected as follows: One of the additional judges shall be elected from the third district of the said circuit by the qualified electors thereof; and four of the additional judges shall be elected from the first district of the said circuit by the qualified electors thereof.

(b). Notwithstanding the provisions of R.S. 13:321 or any other provision of law to the contrary, for purposes of nomination and election only the first district of the Court of Appeal of the

Fifth Circuit shall have seven divisions, which shall be initially designated as Divisions A, B, C, D, E, F, and G. The judges who, on May 1, 1981, hold office in the Court of Appeal for the Fourth Circuit and are domiciled in the first district of the fifth circuit as it is composed in Section 1 of this Act, shall occupy Divisions A through C. The judge having the greatest seniority shall occupy Division A, the judge having the next greater seniority, Division B, and the judge having the next greatest seniority, Division C. Whenever a judge is appointed or elected to succeed a judge of a division, that division shall remain the same without regard to the seniority of any of the judges of the district. The additional judges for the first district provided for in this Act

shall occupy the remaining divisions. Hereafter, additional divisions within the circuit shall be created in accordance with R.S. 13:321.

(c). The initial term of office of each additional judge elected in accordance with the provisions of this Section shall begin on May 1, 1982. The initial term of office for each newly elected judge shall expire on December 31, 1990.

The first judge to be elected to each additional office shall be elected at a special election as provided by Article V, Section 22 of the Constitution. The governor shall call the special primary election for the third Saturday in October, 1981, and the special general election for the sixth

Saturday after the third Saturday in October 1981.

The successors to each said office of judge herein provided, after the initial term of office, shall be elected for terms of ten years.

Each additional judge shall receive the same compensation, expenses, and emoluments of office as are now or hereafter provided by law for the other judges of the circuit.

(d). The office of judge of Division A of the first district of the Court of Appeal for the Fifth Circuit is abolished effective January 1, 1983.

* * *

Section 12. All law or parts of laws in conflict herewith are hereby repealed. Sections 1, 2, 3, 4, 5 and 6 of Act 661 of the 1980 Regular Session of

the Legislature of Louisiana are hereby repealed.

Section 13. (a). Sections 3, 4, 5, 6, 7, 8, 9(b), 10, 11, and 12 of this Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana.

(b). Sections 1, 2 and 9(a) of this Act shall be effective on May 1, 1982. All laws and parts of laws in conflict with Section 1, 2, and 9(a) of this Section shall be repealed effective May 1, 1982.

/s/ Michael H. O'Keefe
PRESIDENT OF THE SENATE

/s/ John J. Hainkel, Jr.
SPEAKER OF THE HOUSE OF REPRESENTATIVES

/s/ David L. Treen
GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: 06/21/1981

[Exhibit D-2, 10/18/90 Hearing]

U.S. Department of Justice

WBR:CWG:TGL:dvs
DJ 166-012-3 Washington, D.C. 20530
G5606-5607
G7029-7030

2 DEC 1982

Honorable William J. Guste, Jr.
Attorney General
State of Louisiana
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. Attorney General:

This is in reference to Act No. 21 (1982), of the Regular Session of the Louisiana Legislature, which creates additional district court judgeships for Judicial District Nos. 1, 15, 18, 23 and 27, divides the 29th Judicial District so as to create the 40th Judicial District, provides for the election of a district attorney in the 40th Judicial District and provides for the January 15, 1983,

special election to be held in that district in the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on October 5, 1982.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Carl Gabel
for Gerald Jones
Chief, Voting Section

[Exhibit D-3, 10/18/90 Hearing]

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

OCT 11 1977

Mr. Kenneth C. DeJean
Assistant Attorney General
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act 164 and Act 620 of the 1977 Regular Session of the Louisiana Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on August 12, 1977.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney

General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By: /s/ Gerald W. Jones
for GERALD W. JONES
Chief, Voting Section

[Exhibit D-4, 10/18/90 Hearing]

U.S. Department of Justice

Washington, D.C. 20530

OCT 19 1981

Kenneth C. DeJean, Esq.
Assistant Attorney General
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 568, H.B. No. 1580 (1981), which provides for the October 17, 1981, referendum election; the creation of an additional judicial district; and the increase in the number of judges for the 16th, 22nd, 24th, and 29th Judicial Districts, in the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on August 18, 1981.

The Attorney General does not interpose any objections to the October 17, 1981, referendum election and the increase in the number of judges for the above-mentioned districts. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

The provision of this Act with respect to the creation of an additional judicial district is viewed as enabling legislation. However, the Attorney General will make no determination with respect to that change since the proposition did not receive voter approval. See Section 51.14 of the Procedures for the Administration of

Section 5 (46 Fed. Reg. 875). Any future attempt to implement this change will be subject to the preclearance requirements of Section 5.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Carl Gabel
for Gerald W. Jones
Chief, Voting Section

[Exhibit D-5, 10/18/90 Hearing]

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

SEP 20 1978

Mr. Kenneth DeJean
Assistant Attorney General
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 39 of the 1978 Regular Session of the Legislature of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on July 26, 1978.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting rights Act expressly provides that the failure of the Attorney

General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By: /s/ Gerald W. Jones
GERALD W. JONES
Chief, Voting Section

[Exhibit D-6, 10/18/90 Hearing]

U.S. Department of Justice

Washington, D.C. 20530

August 18, 1986

L. Adrienne Dupont, Esq.
Staff Attorney
State of Louisiana
Department of justice
Baton Rouge, Louisiana 70804-9005

Dear Ms. Dupont:

This is in reference to four acts of the Louisiana Legislature creating judgeships (Act No. 3 (1965) -- District 9, Division C; District 19, Division F; District 21, Division C; District 24, Divisions F and G; Act No. 2 (1966) -- District 1, Division E; District 15, Division D; District 19, Division G; Civil District Court, Orleans Parish, Division I; Act No. 216 (1970) -- District 19, Divisions H, I, and J; and Act No. 5 (1972) -- District 19, Division

K) and to the procedures for conducting the September 27, 1986, special election and the November 4, 1986, runoff election to fill a vacancy for a judgeship (District 19, Division H), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission of the additional judgeships on July 23, 1986, and your submission of the special elections on July 28, 1986. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section

5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.42 and 51.48.

Because these submissions are related to matters before the court in Clark v. Edwards, C.A. No. 86-435 Sec. A (M.D. La.), we are taking the liberty of sending a copy of this letter to the court.

Sincerely,
Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Sandra Coleman
for Gerald W. Jones
Chief, Voting Section

cc: C. Lee Dupuis, Esq.
Clerk, United States District Court
for the Middle District of
Louisiana

Ernest L. Johnson, Esq.
Johnson, Taylor & Thomas

Samuel Issacharoff, Esq.
Lawyers' Committee for Civil
Rights Under Law

Stipulation - District Court

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
1st	Caddo	A		NO		
		B		NO		
		C		NO		
		D		NO		
		E	Act 2 of 1966	YES	8/18/86	
		F	Act 117 of 1973	YES		9/23/88
		G	Act 46 of 1976	YES	8/11/76	
		H	Act 39 of 1978	YES	9/20/78	
		I	Act 21 of 1982	YES	12/2/82	
2d	Bienville Claiborne Jackson	A		NO		
		B		NO		
		C	Act 39 of 1978	YES	9/20/78	
3d	Lincoln Union	A		NO		
		B	Act 620 of 1977	YES	10/11/77	
4th	Morehouse Ouachita	A		NO		
		B		NO		
		C		NO		
		D	Act 480 of 1970	YES		9/23/88
		E	Act 46 of 1976	YES	8/11/76	
		F	Act 56 of 1984	YES		5/12/89
		G	Act 56 of 1984	YES		5/12/89
5th	Franklin Richland W. Carroll	A		NO		
		B		NO		
		C	Act 39 of 1978	YES	9/20/78	
6th	E. Carroll Madison Tensas	A		NO		
		B	Act 515 of 1974	YES		9/23/88
7th	Calahoula Concordia	A		NO		
		B	Act 39 of 1978	YES	9/20/78	

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
8th	Winn	A		NO		
		B	Act 46 of 1976	YES	8/11/76	
9th	Rapides	A		NO		
		B		NO		
		C	Act 3 of 1965	YES	8/18/86	
		D	Act 158 of 1971	YES		9/23/88
		E	Act 19 and Act 515 of 1974	YES		Both objected to 9/23/88
		F	Act 39 of 1978	YES	9/20/78	
10th	Natchitoches	A		NO		
		B	Act 635 of 1979[2/]	NO		
11th	Desoto Sabine	A		NO		
		B		NO		
12th	Avoyelles	A		NO		
		B	Acts 56 of 1984	YES	5/12/89	
13th	Evangeline	A		NO		
		B	Acts 156 of 1980	YES	2/17/89	
14th	Calcasieu	A		NO		
		B		NO		
		C		NO		
		D		NO		
		E	Act 40 of 1967	YES		9/23/88
		F	Act 332 of 1975	YES		9/23/88
		G	Act 322 of 1980	YES		9/23/88
		H	Act 322 of 1980	YES		9/23/88
15th	Acadia Lafayette Vermillion	A		NO		
		B		NO		

[2/] Act 635 of 1979 split the 10th Judicial District and created the 39th Judicial District. The parties cannot stipulate as to Act 635 of 1979.

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
		C		NO		
		D	Act 2 of 1966	YES	8/18/86	
		E	Act 360 of 1970	YES		9/23/88
		F	Act 43 of 1976	YES		9/23/88
		G	Act 39 of 1978	YES	9/20/78	
		H	Act 322 of 1980	YES		9/23/88
		I	Act 322 of 1980	YES		9/23/88
		J	Act 21 of 1982	YES	12/2/82	
		K	Act 226 of 1983	YES	10/7/83	
16th	Iberia, St. Martin, St. Mary	A		NO		
		B		NO		
		C		NO		
		D	Act 104 of 1968	YES		9/23/88
		E	Act 620 of 1977	YES	10/11/77	
		F	Act 568 of 1981	YES	10/19/81	
		G	Act 56 of 1984	YES		5/12/89
17th	Lafourche	A		NO		
		B		NO		
			Act 35 of 1967	YES	5/12/89[1]	
			Act 307 of 1968	YES	5/12/89[1]	
			Act 124 of 1970	YES	5/12/89[1]	
			Act 11 of 1972	YES	5/12/89[1]	
		C	Act 46 of 1976	YES	8/11/76	
		D	Act 215 of 1978	YES	9/19/78	
18th	Iberville, Pointe Coupee, West Baton Rouge	A		NO		
		B		NO		
		C	Act 86 of 1968	YES		9/23/88
		D	Act 21 of 1982	YES	12/2/82	
19th	East Baton Rouge	A		NO		
		B		NO		
		C		NO		

[1] The plaintiffs cannot at this time verify this information.

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
		D		NO		
		E		NO		
		F	Act 3 of 1965	YES	8/18/86	
		G	Act 2 of 1966	YES	8/18/86	
		H	Act 216 of 1970	YES	8/18/86	
		I	Act 216 of 1970	YES	8/18/86	
		J	Act 216 of 1970	YES	8/18/86	
		K	Act 5 of 1972	YES	8/18/86	
		L	Act 46 of 1976	YES	8/11/86	
		N	Act 39 of 1978	YES	9/20/78	
		Family Court A		NO		
		Family Court B	Acts 620 of 1977	YES	10/11/77	
		Family Court C	Act 620 of 1977	YES	10/11/77	
20th	E. Feliciana W. Feliciana	A		NO		
		B	Act 34 of 1981	YES		9/23/88
21st	Livingston, St. Helena, Tangipahoa	A		NO		
		B		NO		
		C	Act 3 of 1965	YES	8/18/86[1]	
		D	Act 9 of 1974	YES		9/23/88
		E	Act 620 of 1977	YES	10/11/77	
		F	Act 56 of 1984	YES		5/12/89
22d	St.Tammany, Washington	A		NO		
		B		NO		
		C	Act 23 of 1970	YES	9/23/88	
		D	Act 46 of 1976	YES	8/11/76	
		E	Act 39 of 1978	YES	9/20/78	
		F	Act 568 of 1981	YES	10/19/81	
		G	Act 8 of 1990	YES		DOJ has requested further information.

[1] The plaintiffs cannot at this time verify this information.

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
23d	Ascension, Assumption, St. James	A		NO		
		B		NO		9/23/88
		C	Act 464 of 1968	YES		
		D	Act 21 of 1982	YES	12/2/82	
24th	Jefferson	A		NO		
		B		NO		
		C		NO		
		D		NO		
		E		NO		
		F	Act 3 of 1965	YES	8/8/86	
		G	Act 3 of 1965	YES	8/8/86	
		H[1]				
		I[2]				
		J	Act 503 of 1974	YES		9/23/88
		K	Act 503 of 1974	YES		9/23/88
		L	Act 620 of 1977	YES	10/11/77	
		M	Act 39 of 1978	YES	9/20/78	
		N	Act 568 of 1981	YES	10/19/81	
		O	Act 568 of 1981	YES	10/19/81	
		P	Act 8 of 1990	YES		9/17/90
25th	Plaquemines	A		NO		
		B		NO		
		C		NO		
		D	Act 60 of 1970	YES	2/17/89	
	Split 25th, created 34th		Act 13 of 1975	YES	2/17/89	
26th	Bossier, Webster	A		NO		
		B		NO		
		C	Act 230 of 1970	YES	3/4/88[3]	
		D	Act 733 of 1975	YES	3/4/88[3]	
		E	Act 174 of 1989	YES		9/17/90

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[1] The parties cannot stipulate as to Division H of the 24th JDC.

[2] The parties cannot stipulate as to Division I of the 24th JDC.

[3] The plaintiffs cannot at this time verify this information.

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
27	St. Landry	A		NO		
		B		NO		
		C	Act 158 of 1971	YES		9/23/88
		D	Act 21 of 1982	YES	12/2/88	
28th	LaSalle	A		NO		
29th	St. Charles	A		NO		
		B		NO		
		C	Act 94 of 1970	YES		9/23/88
		D	Act 39 of 1978	YES	9/20/78	
		E	Act 568 of 1981	YES	10/19/81	
	Split 29th, created 40th		Act 21 of 1982	YES	12/2/82	
30th	Vernon	A		NO		
		B	Act 11 of 1972	YES	5/12/89[3]	
		C	Act 46 of 1976	YES	8/11/76	
			Act 164 of 1977	YES	10/11/77	
31st	Jefferson Davis	A		NO		
			Act 694 of 1968	YES	5/12/89[3]	
32d	Terrebone	A	Act 307 of 1968	YES	5/12/89[3]	
		B	Act 307 of 1968	YES	5/12/89[3]	
			Act 124 of 1970	YES	1/9/89[3] and 5/12/89[3]	
			Act 11 of 1972	YES	5/12/89[3]	
		C	Act 515 of 1974	YES		9/23/88
		D	Act 84 of 1974	YES	5/12/89[3]	
		E	Act 516 of 1979 and Act 519 of 1979	YES	Both precleared 5/12/89[3]	
33d	Allen	A	Act 694 of 1968	YES	5/12/89[3]	
34th	St. Bernard	A	Act 13 of 1975	YES	2/17/89	
		B	Act 13 of 1975	YES	2/17/89	
		C	Act 620 of 1977	YES	10/11/77	

---

[3] The plaintiffs cannot at this time verify this information.

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
		D	Act 611 of 1989	YES		YES[1]
35th	Grant	A	Act 47 of 1976	YES	8/11/76	
36th	Beauregard	A	Act 164 of 1977	YES	10/11/77	
37th	Caldwell	A	Act 620 of 1977	YES	10/11/77	
38th	Cameron	A	Act 14 of 1978 and Act 39 of 1978	YES	Both precleared 9/18/78	
39th	Red River	A	Act 635 of 1979[2]			
40th	St. John the Baptist	A	Act 21 of 1982	YES	12/2/82	
		B	Act 21 of 1982	YES	12/2/82	
		C	Act 608 of 1989 Act 611 of 1989	YES		9/17/90

[1] The plaintiffs cannot at this time verify this information.

[2] Act 635 of 1979 split the 10th Judicial District and created the 39th Judicial District. The parties cannot stipulate as to the 39th JDC.

Stipulation - Court of Appeal

Cir.	District	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
1	2	C	Acts 114, 1975	YES	NO	9/23/88
1	3	C	Acts 114, 1975	YES	NO	9/23/88
1	adopted designated divisions		Acts 305, 1975	YES	NO	9/23/88
2	at-large		Act 114 of 1975	YES	NO	9/23/88
2	1	C	Act 8 of 1990	YES	NO	9/17/90
2	3	C	Act 8 of 1990	YES	NO	9/17/90
3	1	C	Act 801 of 1987	YES	NO	9/23/88
3	2	C	Act 801 of 1987	YES	NO	9/23/88
3	3	C	Act 801 of 1987	YES	NO	9/23/88

RUBIN, CURRY, COLVIN & JOSEPH
A PROFESSIONAL LAW CORPORATION

October 20, 1990

VIA FEDERAL EXPRESS
The Honorable W. Eugene Davis Judge
United States Court of Appeals
for the Fifth Circuit
Suite 300, 556 Jefferson St.
P.O. Box 19
Lafayette, La. 70501

VIA HAND DELIVERY
The Honorable John V. Parker, Chief Judge
United States District Court
Middle District of Louisiana
Suite 228, 707 Florida Boulevard
Baton Rouge, LA 70801

VIA HAND DELIVERY
The Honorable Frank J. Polozola, Judge
United States District Court
Middle District of Louisiana
Suite 228, 707 Florida Boulevard
Baton Rouge, LA 70801

Re: Clark v. Roemer, Three Judge Court
Docket No. 86-345 A

Dear Judges Davis, Parker and Polozola:

Attached is the chart to which the parties have stipulated. The attached chart has been agreed to by the plaintiffs, the State Defendants, and the

Louisiana District Judges Association. Our law firm has been authorized to transmit this chart as the stipulated position of the State of Louisiana (through the offices of the Governor, the Attorney General and the Secretary of State).

As you will note from the footnotes to the chart, the parties could not reach a stipulation on the following judicial districts:

10th JDC, Natchitoches Parish
24th JDC, Divisions H & I, Jefferson Parish
39th JDC, Red River Parish

The reasons the parties could not reach agreement on these areas is that the plaintiffs wanted explanatory material added to the chart; the defendants did not believe that the Court wanted and explanation of positions, but rather only a listing of those areas

where disagreement occurred. The result was a stipulated chart that left the areas of disagreement blank with a note that the parties could not reach agreement on these particular items.

This letter will set forth the position of the State Defendants and the LDJA on these points on which agreement could not be reached.

Attached you will find additional versions of pages 3, 8, 9 and 12 to the chart; these pages contain the versions of the chart that the Governor and the LDJA contend should be used for the 10th, 24th, and 39th Judicial Districts.

Concerning the 10th and 39th JDC

Act 635 of 1979 split the old 10th JDC (which had previously consisted of both Natchitoches and Red River Parishes) and created the 39th JDC, to be comprised

only of Red River Parish. As part of Act 635, a special election was called. On November 13, 1979 the Justice Department precleared the special election; a copy of the Department's letter is attached as Exhibit D-1 from the September 28, 1990 hearing. At this point in time, no one can locate the letter requesting preclearance.

It is the position of the Governor, the Attorney General, the Secretary of State, and the LDJA that preclearance of the special election by necessity was a preclearance of the split of the judicial districts. Act 635 was clear on its face that it both created a judicial district and called a special election; the Justice Department's preclearance of the election required it to look at the entire statute, and the statute is

absolutely clear about the split of districts. When the statute is clear about what it is accomplishing, the current unavailability of the transmittal letter itself sending the statute itself need not be a stumbling block. The pertinent provisions of Act 635 provide:

> Section 6. There is hereby established the office of judge for the Thirty-Ninth Judicial District Court, to be composed of the parish of Red River as provided in this Act.
>
> The Judge herein provided for shall be elected at large from the parish of red River * * *.
>
> The first judge elected to the judgeship shall be elected at the special election hereinafter provided for and shall serve for a term which shall expire at the same time as is provided by law for the other judges of the district courts throughout the state.
>
> Section 8. The governor, within fifteen days after the effective date of this Section, shall call a special election, to be held at the same time as the gubernatorial primary elections to be held in 1979, to submit to a vote of the voters of the **existing Tenth Judicial District, being the parishes of**

> **Natchitoches and Red River**, for their approval or disapproval . . . [of] the following proposition in substantially the following form: (emphasis supplied).
>
> > FOR the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Red River Parish, and continuing the Tenth Judicial District composed of Natchitoches Parish as provided by . . . the 1979 Regular Session of the Louisiana Legislature.
>
> and also:
>
> > AGAINST the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Red River Parish, and continuing the Tenth Judicial District composed of Natchitoches Parish as provided by . . . the 1979 Regular Session of the Louisiana Legislature.
>
> Section 9. If the proposition submitted to the electors as provided for in Section 8 of this Act is approved by the electors then:
>
> 1) On and after March 1, 1980, the Tenth and Thirty-Ninth Judicial Districts shall be composed as is provided in . . . of this Act.

> 2) The governor, within fifteen days after the results of the referendum . . . shall call a special election for the purpose of electing a judge and a district attorney for the Thirty-Ninth Judicial District. The primary election shall be held on the first Saturday in January, 1980, and the general election shall be on the sixth Saturday after the first Saturday in January, 1980.
> * * *

Section 13. For the purpose of transmission of this Act to the United States Department of Justice, as required by federal law, this Act shall be come effective upon signature by the governor . . .

Therefore, the State Defendants and the LDJA contend that the 1979 Department of Justice letter operated to preclear the split, the creation of a judgeship for Red River Parish, and the 1980 election of the judge for Red River Parish.

For some reason unknown to the State Defendants, the Department, in its

September 23, 1988 letter, now refuses to grant preclearance. It is the State Defendant's position that the preclearance has been obtained an the Department may not withdraw that preclearance nine years after it has been granted.

The plaintiffs, through Mr. McDuff, has informed us today that he would not stipulate to any information being put in columns 6, 7, or 8 of the chart concerning the 10th and 39th Judicial Districts unless a detailed footnote was given.[1/]

[1/] The footnotes the plaintiffs wanted were:

> "The defendants contend that the November 13, 1979 preclearance letter, which is ex. D-1 at the 9/28/90 hearing of this case, precleared the split. The plaintiffs contend to the contrary and contend that the Nov. 13, 1979 letter specifically precleared only "the special

(Footnote continued on following page)

Concerning the 24th JDC

There are two judgeships at issue, Divisions H and I. As this Court is aware, Louisiana statutes do not list judgeships; the judicial statute only lists the number of judges. The pertinent provision for the 24th JDC is R.S. 13:621.24.

Act 5 of 1972 made it clear that there were to be nine judges in the 24th JDC as of that date, and that Act was

---

[1/](Footnote continued from preceding page) election for the Tenth Judicial District" provided by Act 635, and did not preclear the split of the district. The plaintiffs further contend that there is no indication that the split was submitted under Section 5 prior to the Nov. 13, 1979 letter."

The second footnote the plaintiffs wanted was: "The Assistant Attorney General's 9/23/88 letter objected to the split. The defendants contend there was prior preclearance, as noted in the previous footnote. The plaintiffs contend otherwise."

precleared by a letter of August 18, 1986. For some unexplained reason, the Department of Justice refused (by a letter of September 23, 1988) to preclear Act 78 of 1965.

Act 5 of 1972 (which was precleared) stated that there were 9 judges in the 24th JDC; Act 78 of 1968 provided for the election of the two new seats from 7 to 9. It is the State Defendant's position that the preclearance of the 1972 Act (by a letter of 1986) certainly of necessity constitutes preclearance of these two additional judgeships; the Department and the plaintiffs have no basis to now contend that the statute 1968 Act that called for the elections to fill these two new seats was not by necessity precleared.[2/]

[2/] The pertinent provisions of Act 78 (Footnote continued on following page)

The lengthy footnote that the plaintiffs wanted inserted into the chart[3/] was unnecessary and argumentative; as can be seen by the attachments, the proposed page of the chart concerning the 24th JDC merely notes the basic facts of the parties' disagreement.

[2/](Footnote continued from preceding page) provide:

Section 3. * * * The first judges to be selected to fill the additional judgeships herein created shall be elected at a special election . . ."

[3/] The footnote proposed by the plaintiffs was: "The Plaintiffs are unable to confirm that Act 5 was precleared, and contend that there has been no proof presented to show that it was precleared, or to demonstrate the scope of Act 5 or any Section 5 submission or preclearance. Further, the plaintiffs contend that even if Act 5 was precleared, it did not create Divisions H and I, and that its preclearance does not excuse the failure to preclear Act 78, which did create Divisions H and I."

One Additional Matter

Finally, with regard to the Stipulation on the Courts of Appeal, the chart does not make reference to an act which the State Defendants and the LDJA feel must be brought to the attention of the Court. Act 3 of 1981 amended R.S. 13:321.1 to increase the number of judges on the First Circuit from 9 to 12. This Act was precleared by the Department of Justice on August 6, 1981; a copy of the State of Louisiana's submission letter requesting preclearance and a copy of the preclearance letter from the Department of Justice are attached to this letter. The plaintiffs, the State Defendants and the LDJA contend that it precleared not only the addition of judges but the assignment of those judgeships to district and divisions.

Therefore, while the parties can stipulate to the chart that was submitted, the State Defendants and the LDJA assert that their proposed revisions are a more clear explanation of each seat's current status.

Sincerely,

/s/ Michael H. Rubin
Michael H. Rubin

/s/ Robert H. Pugh
Robert H. Pugh

MHR/tah
Enclosures
cc: Mr. John Kennedy
Mr. Ernest L. Johnson
Honorable Fred J. Cassibry
Ms. Yvonne L. Hughes
Honorable Frank Foil
Mr. Robert P. McLeod
Mr. Jack C. Benjamin
Mr. Thomas J. DeJean
Mr. Harry A. Rosenberg
Mr. Kenneth C. DeJean
Ms. Cynthia Rougeau
Mr. Robert B. McDuff
Mr. Roy Mongrue
Mr. Ulysses Gene Thibodeaux

[One of the attachments to this letter, the defendants' proposed substitute chart

pages, is reproduced in the following pages. The second attachment was a copy of exhibit D-6 from the 9/28/90 hearing, and it is reproduced elsewhere in the Joint Appendix. The third attachment was the stipulated chart of the parties, and it is reproduced elsewhere in the Joint Appendix].

[Defendants' substitute chart pages attached to Rubin letter of 10-20-91].

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
		C	Act 3 of 1965	YES	8/18/86	
		D	Act 158 of 1971	YES		9/23/88
		E	Act 19 and Act 515 of 1974	YES		Both objected to 9/23/88
		F	Act 39 of 1978	YES	9/20/78	
10th	Natchitoches	A		NO		
		B		NO		
			Act 635 of 1979	YES	11/13/79[1]	9/23/88[2]
11th	Desoto, Sabine	A		NO		
		B		NO		
12th	Avoyelles	A		NO		
		B	Acts 56 of 1984	YES	5/12/89	
13th	Evangeline	A		NO		
		B	Acts 156 of 1980	YES	2/17/89	
14th	Calcasieu	A		NO		
		E	Act 39 of 1978	YES	9/20/78	
		F	Act 568 of 1981	YES	10/19/81	
		G	Act 8 of 1990	YES		DOJ has requested further information
23rd	Ascension, Assumption, St. James	A		NO		
		B		NO		
		C	Act 464 of 1968	YES		9/23/88
		D	Act 21 of 1982	YES	12/2/82	

[1] The plaintiffs do not believe this preclearance affects the split of the 10th Judicial District, only the special election. The State's position is to the contrary.

[2] Plaintiffs contend there was never preclearance of any split. The State contends the preclearance was valid and denial is an untimely attempt to reverse the preclearance.

[Defendants' substitute chart pages attached to Rubin letter of 10-20-91].

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
24th	Jefferson	A		NO		
		B		NO		
		C		NO		
		D		NO		
		E		NO		
		F	Act 3 of 1965	YES	8/18/86	
		G	Act 3 of 1965	YES	8/18/86	
		H	Act 78 of 1968 and Act 674 of 1968; Act 5 of 1972.	YES	Act 5 of 1972; 8/18/86[1]	Acts 78 and 674 of 1968 9/23/88
		I	Act 78 of 1968 and Act 674 of 1968; Act 5 of 1972	YES	Act 5 of 1972; 8/18/86[1]	Acts 78 and 674 of 1968 9/23/88
		J	Act 503 of 1974	YES		9/23/88
		K	Act 503 of 1974	YES		9/23/88
		L	Act 620 of 1977	YES	10/11/77	
		M	Act 39 of 1978	YES	9/20/78	
		N	Act 568 of 1981	YES	10/19/81	
		O	Act 568 of 1981	YES	10/19/81	
		P	Act 8 of 1990	YES		9/17/90
25th	Plaquemines	A		NO		
		B		NO		
		C		NO		
		D	Act 60 of 1970	YES	2/17/89	
	Split 25th, created 24th		Act 13 of 1975	YES	2/17/89	
26th	Bossier, Webster	A		NO		
		B		NO		
		C	Act 230 of 1970	YES	3/4/88*	

[1] Plaintiffs contend that Acts 78 and 674 of 1968 created Divisions H and I. The state contends that Act 5 of 1972 confirmed the creation of the 9th Judgeship in the 24th JDC.

[2] Plaintiffs contend that Act 78 and 674 of 1968 created Divisions H and I. The state contends that Act 5 of 1972 confirmed the creation of the 9th Judgeship in the 24th JDC.

[Defendants' substitute chart pages attached to Rubin letter of 10-20-91].

JDC	Parish	Division	Added	Preclearance Requested	Preclearance Granted	Preclearance Denied
39th	Red River	A	Act 635 of 1979	YES	11/13/79[2]	9/23/88[3]
40th	St. John the Baptist	A	Act 21 of 1982	YES	12/2/82	
		B	Act 21 of 1982	YES	9/17/90	
		C	Act 608 of 1989, Act 611 of 1989			

[2]The plaintiffs do not believe this preclearance affects the split of the 10th Judicial District into the 10th and 39th Judicial Districts. The State's position is to the contrary.

[3]Plaintiffs contend there was never preclearance of any split. The State contends the preclearance was valid and the denial is an untimely attempt to reverse the preclearance.

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
SUITE 400 * 1400 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20005
PHONE (202) 371-1212

October 20, 1990

By Telecopier

Hon. John V. Parker
United States District Judge
707 Florida St.
Room 228
Baton Rouge, LA 70801

RE: Clark v. Roemer, No. 86-435-A

Dear Judge Parker:

The stipulated chart being forwarded to you today contains no stipulations regarding the 10th and 39th judicial districts, and Divisions H and I of the 24th judicial district. This letter is to explain the plaintiffs' position regarding these districts, and to add a point regarding the First Circuit Court of Appeal.

1. Elections should be enjoined for the 10th and the 39th judicial districts. The former 10th judicial district, composed of Natchitoches and Red River Parishes, was split by Act 635 of 1979, leaving Natchitoches Parish in the 10th with two judges, and creating the new 39th composed of Red River Parish, with one judge. That split was never precleared and was the subject of a Section 5 objection issued in the Assistant Attorney General's September 23, 1988 letter. However, at the September 28, 1990 hearing before the three-judge court, the defendants introduced as Exhibit D-1 a November 13, 1979 letter from the then Assistant Attorney General preclearing "the special election for the Tenth Judicial District in Louisiana (Act 635 (1979)) submitted

to the Attorney General pursuant to Section 5." The defendants apparently contend that letter also precleared the split of the district. The plaintiffs disagree. The letter indicates that, at most, a special election provided in the Act was submitted and precleared, but does not indicate that the split of the district was submitted and precleared. The defendants have offered no proof to demonstrate that the split of the district was precleared, and have not introduced into evidence the submission made under Section 5 that led to the November 13, 1979 letter. Indeed, a review of the portion of Act 635 contained in the annotations to La. Rev. Stat. 13:477 (under the heading "1979 legislation") indicates that the only special election to be held in the 10th

judicial district was a referendum election to be held in the pre-existing two-parish district. Preclearance of the scheduling and holding of a special election does not constitute preclearance of the creation of new judicial district. Accordingly, since no preclearance was ever obtained for the configuration of new districts, and since they are the subject of a Section 5 objection, elections may not be held in the new districts.

2. Divisions H and I (the 8th and 9th judgeships) of the 24th judicial district were created by Acts 78 and 674 of 1978, both of which were the subject of a Section 5 objection on September 23, 1988. The defendants contend that a later act, Act 5 of 1972, provided there were to be nine judgeships in the 24th

district, and they further contend that act was precleared on August 18, 1986 and this excuses the failure to preclear Acts 78 and 674. The plaintiffs disagree with this for two reasons. First, we are unable to confirm that Act 5 was actually precleared. We have never seen a copy of any preclearance letter or any submission made by the state. We do not believe these items were presented to the court by the defendants (if so, we were never provided copies). Thus, there is no proof that Act 5 was precleared, and there is no proof regarding the scope of Act 5 or the scope of any Section 5 submission or preclearance. Second, even if Act 5 was precleared, it did not create Divisions H and I, and therefore its preclearance cannot excuse the

failure to preclear Acts 78 and 674 of 1968, which did create Divisions H and I.

3. We contend that all elections for the First Circuit Court of Appeal should be enjoined for failure to preclear Act 305 of 1975, which provides for designated divisions in the First Circuit.

Thank you for your consideration of these views.

Sincerely,

/s/ Robert B. McDuff
Robert B. McDuff
Co-counsel for Plaintiffs

cc: Mike Rubin (by telecopier)
Ken DeJean "
Cynthia Rougeau "
Robert Pugh "
Fred Cassibry "

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANICE G. CLARK, ET AL

VERSUS CIVIL ACTION
NUMBER 86-435-A

CHARLES "BUDDY" ROEMER, ET AL.

RULING OF THE THREE-JUDGE COURT ON PLAINTIFFS' MOTION TO THE THREE JUDGE COURT TO STAY THAT PORTION OF THE COURT'S OCTOBER 22, 1990 ORDER PERMITTING ELECTED JUDGES TO TAKE THE JUDICIAL OATH OF OFFICE

The court has carefully considered the motion filed on behalf of plaintiffs and concludes that it is not meritorious. Accordingly, the motion is hereby DENIED.

Baton Rouge, Louisiana, October 25, 1990.

/s/ W. Eugene Davis
JUDGE W. EUGENE DAVIS,
UNITED STATES CIRCUIT JUDGE

/s/ John V. Parker
JUDGE JOHN V. PARKER,
CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

/s/ Frank J. Polozola
FRANK J. POLOZOLA,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

----------X

JANICE G. CLARK, et al.

Plaintiffs,

vs.

CIVIL ACTION
NO. 86-435
SEC. A

CHARLES "BUDDY" ROEMER,
GOVERNOR OF LOUISIANA;
et al.

Defendants.

----------X

PLAINTIFFS' MOTION TO THE THREE-JUDGE COURT TO PREVENT JUDGES FROM HOLDING OFFICE IN THE JUDGESHIPS FOR WHICH NO CANDIDATE WAS ELECTED BECAUSE OF THE INJUNCTION OF THE UNITED STATES SUPREME COURT

[Filed December 27, 1990]

The plaintiffs move for an order by the three-judge court enjoining the state defendants from permitting anyone to serve as a judge past January 1, 1991, in any of the unprecleared seats for which

no candidate was elected because of the November 2, 1990 injunction (as modified on November 5, 1990) of the United States Supreme Court in this case. In support of this motion, the plaintiffs state as follows:

1. This Court retains jurisdiction to consider this motion. In its October 22, 1990 order and October 31, 1990 opinion, the Court specifically retained jurisdiction of this case. No final judgment has been issued. Although a notice of appeal has been filed by the plaintiffs, it is an appeal from this Court's denial of injunctive relief, and not from any final judgment. See 28 U.S.C. Section 1253 ("any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in

any civil action . . . determined by a district court of three judges"). If a final judgment had been issued and appealed, this Court might lack jurisdiction to entertain further proceedings. But here, no final judgment has been issued and the appeal is from the specific denial of injunctive relief. Thus, as stated in the October 22 order and the October 31 opinion, this Court retains jurisdiction of the case.[7/]

[7/] The plaintiffs' original notice of appeal was filed October 26. Had that notice of appeal deprived this Court of any jurisdiction, this Court would have been unable to issue its October 31 modification of the October 22 order regarding District 20-B, and would have been unable to make the statement in the October 31 opinion specifically retaining jurisdiction of the case. However, this Court was correct in stating that it still has the power to retain jurisdiction even after the notice of appeal from the denial of injunctive relief.

Accordingly, this motion may be entertained.

2. Only recently have the plaintiffs been told that the State defendants intend to allow incumbent judges to remain in office in the unprecleared judicial seats for which no candidate was elected because of the Supreme Court's November 2, 1990 injunction. That notification did not come in writing, but was given orally by John Kennedy, special counsel to the Governor. For the past few weeks, the plaintiffs have attempted to learn the position of the State defendants regarding these judgeships, but were not told of the defendants' plans until a few days ago.

3. In the application the plaintiffs filed with the United States

Supreme Court prior to the November 2 injunction, the plaintiffs stated that this three-judge district court has the discretion under Brooks v. State Board of Elections, No. 288-146 (S.D. Ga. order of May 29, 1990), aff'd, No. 90-272, 59 U.S.L.W. 3293 (Oct. 15, 1990), to permit incumbents to hold over in unprecleared seats if the elections are enjoined and if the State seeks preclearance in the District of Columbia. However, the State defendants have never asked this Court, in the wake of the Supreme Court's injunction, to exercise its discretion and permit the incumbents to hold over.

4. Given that the Louisiana acts creating the unprecleared judgeships are unenforceable, the State defendants do not have the power, absent an order of this Court, to allow incumbents to hold

over in those judgeships. Unless this Court exercises its discretion, those judgeships are null and void.

5. None of the orders of this Court, including the October 22, 1990 order, permit the incumbents to hold over in the seats for which no candidates were elected due to the Supreme Court's injunction. The October 22 order allows candidates elected in the October 6, November 6, and December 8 elections to hold office provisionally while the State seeks preclearance in the District of Columbia. However, the November 6 and December 8 elections in certain seats were enjoined by the Supreme Court, and in some of those seats no candidate has been elected. This Court's October 22 order contains nothing allowing

incumbents to hold over in those seats in the absence of an election.

6. In light of the fact that the State has not timely filed a motion requesting this Court to exercise its discretion and permit the incumbents to remain in office, this Court should not permit the incumbents to remain in office. By failing to seek relief from this Court and failing to inform the Court of their intentions, the State defendants continue to display the contempt for federal law that has characterized their actions throughout these Section 5 proceedings.

7. Even if the State had timely filed a motion asking this Court to exercise its discretion to permit incumbents to hold over, the Court should not exercise its discretion in that

fashion. The unprecleared changes are null and void under Section 5. The Supreme Court has enjoined the November 6 and December 8 elections for certain seats and has not said anything about permitting incumbents to remain in office. The incumbents currently in those judicial seats attained office in prior elections that violated Section 5. Vigorous enforcement of Section 5 requires that incumbents illegally elected be prevented from holding over in seats that are unprecleared.

8. The judgeships subject to the Supreme Court's injunction and for which no candidates were elected, and in which incumbents have been sitting, are as follows:

4th district, division G

14th district, divisions E, F, and G.

The remaining judgeships included within the Supreme Court's injunction all had candidates elected prior to November 6, either by virtue of being unopposed or being elected in an October 6 primary, or are new judgeships in which no incumbent has ever sat (22-G and 24-P).[8/] The Supreme Court did not enjoin the persons elected prior to November 6 from taking office, and the plaintiffs accordingly are not asking this Court to take further action regarding the judgeships in which someone was elected prior to November 6.

8/ The listing of which judgeships had candidates elected prior to November 6 and which did not is based upon representations made to plaintiffs' counsel by the Governor's attorney, Robert Pugh, in a November 5, 1990 letter.

One of the judgeships subject to the Supreme Court's injunction and in which a candidate was elected October 6 (6th district, division B) has since been precleared by the Attorney General.

However, for those judgeships listed above in which no one was elected due to the Supreme Court's injunction against the November 6 and December 8 elections, this Court should issue an injunction preventing the State defendants from allowing any judge to remain in office past January 1, 1990, when the current terms of office expire.

9. The judgeships in district 22, division G and district 24, division P are recently created judgeships in which no incumbent sits because no election has been held. Both judgeships were scheduled to be filled by election on November 6 and the Supreme Court's injunction prevented the election. The state defendants have not indicated any intention to fill those unprecleared seats through appointment. Any action to

that effect would violate Section 5 and the Supreme Court's injunction.

In light of the foregoing, this Court should issue an order preventing the State defendants from permitting any judge to serve past January 1, 1990 in any judgeship for which no candidate was elected due to the Supreme Court's injunction.

A memorandum of authorities accompanies this motion, and a proposed order also is submitted.

Respectfully submitted:

/s/ Ernest L. Johnson
ERNEST J. JOHNSON
T. RICHARDSON BOBB
Johnson, Taylor & Thomas
5700 Florida Boulevard
Republic Tower Suite 209
Baton Rouge, LA 70806
(504) 929-7676

/s/ Robert B. McDuff
ROBERT B. MCDUFF
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IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF LOUISIANA

JANICE CLARKE et al., Plaintiffs, v. CHARLES E. ROEMER, et al. Defendants	)	CIVIL ACTION NO. 86-435 Section A
UNITED STATES OF AMERICA, Amicus Curiae.	)	

RESPONSE OF THE UNITED STATES TO PLAINTIFFS' MOTION TO PREVENT CERTAIN PERSONS FROM HOLDING OVER IN OFFICE

On December 27, 1990, the plaintiffs filed a motion seeking to enjoin any person from serving "as a judge past January 1, 1991, in any of the four unprecleared seats [4th Judicial District, Division G and 14th Judicial

District, Divisions E, F, and G] for which no candidate was elected" as a result of the injunction issued by the United States Supreme Court. Pursuant to this Court's order, the United States submits this response.

The four judgeships at issue are among fourteen judgeships[9/] which this Court has found to be subject to a valid Section 5 objection interposed by the Attorney General.[10/] Of the fourteen judgeships, five positions were filled at the election conducted on October 6,

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9/ Originally, there were fifteen such judgeships but on November 20, 1990, the Attorney General withdrew the objection to one.

10/ This Court also has determined that the Attorney General's objections to another, discrete category of judgeships was not timely. The plaintiffs' motion does not affect any of these positions.

1990.[11/] When this Court ruled on October 22, 1990, there were nine judgeships where the 1990 election cycle had not begun or was not completed (because no candidate received a majority of votes cast on October 6, 1990). Five of these judgeships[12/] were newly-created positions which had never been filled and the four at issue here had incumbents. With regard to these judgeships, this Court ordered that elections would be held on November 6 and December 8, 1990, if necessary.

11/ District 4, Division F; District 14, Division H; District 16, Division G; District 20, Division B; and District 21, Division F.

12/ District 22, Division G; District 24, Division P; District 26, Division E; Second Circuit Court of Appeal, District 1, Division C; and Second Circuit Court of Appeal, District 3, Division C.

The October 22 order also provided that persons elected to the unprecleared judgeships would serve "provisionally" contingent upon the state's compliance with a schedule for obtaining Section 5 preclearance. In sum, the schedule requires that by January 22, 1991, the state must either obtain Section 5 preclearance of the unprecleared judgeships from the Attorney General or file a declaratory judgment action seeking Section 5 preclearance in the United States District Court for the District of Columbia. If the state fails to do so, all the unprecleared judgeships will cease to exist with the result that there will be no judgeships in which persons may hold over. As of this date, the Attorney General has received no request for reconsideration from the

state nor has the state filed a declaratory judgment action in the District of Columbia district court.

On November 2, 1990, the Supreme Court granted the plaintiffs' request for an injunction pending appeal of the elections scheduled for November 6 and December 8, 1990, for the judgeships found by this Court to be subject to a valid Section 5 objection.[13/] As a result of the Supreme Court's action, elections for these judgeships, including the four at issue, did not occur.

As we have noted above, Part III of the October 22 order provided that persons elected to the unprecleared positions in the 1990 elections would serve "provisionally." The order also

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[13/] The plaintiffs' request for additional injunctive relief concerning other judgeships was denied.

established the conditions under which they would continue to hold office. By their motion the plaintiffs seek to prevent persons in four judgeships[14/] from holding over as "provisional" officeholders under the same conditions imposed on persons serving in the other unprecleared judgeships because they were not elected during the 1990 election cycle.

As we previously have informed this Court, it may be appropriate for judges whose terms expired on December 31, 1990, to hold over in office as long as the Court requires the state to seek

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14/ Our information is that one of the four judgeships currently is held by person appointed to replace a judge who had retired. We believe that, under this Court's order (Pt. III(7)), a person named to replace a judge may hold over on a "provisional" basis under the same conditions as other persons in the unprecleared judgeships.

compliance with Section 5 within a prescribed time period.[15/] We believe that such a course of action is appropriate in order to avoid any possible disruption of the state's judicial system that might occur if sitting judges elected in violation of Section 5 were not permitted to occupy the seats at issue pending the election of their successors pursuant to valid election procedures. That concern is fully satisfied by permitting incumbents to hold over in office on a provisional basis. Movants here have not pointed to any reason why those incumbent judges

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15/ Under this Court's order, if the state fails to obtain such preclearance from the Attorney General or to seek preclearance from the District of Columbia district court within that time frame, all unprecleared judgeship positions will cease to exist as a matter of law.

elected prior to the 1990 election cycle should be treated differently from those judges elected as a result of the October 1990 elections and who will be permitted to take office on a provisional basis consistent with this Court's prior orders.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JANICE CLARK, ET AL

VERSUS CIVIL ACTION
NO. 86-435-A

CHARLES E. ROEMER, ET AL

AMENDED ORDER

[Filed January 11, 1991]

The court has pending before it a motion on behalf of plaintiffs to prevent certain state judges from continuing in office and to prevent the state from otherwise filling those offices. The state judgeships involved are among those the creation of which have not been "precleared" by the Attorney General of the United States as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1965, 42 U.S.C. §1973c, and they are listed in Part II of this court's

order dated October 22, 1990. The specific judgeships which are the object of the motion are Division G of the Fourth Judicial District, Morehouse and Ouachita Parishes, and Divisions E, F and G of the Fourteenth Judicial District, Calcasieu Parish.

The court's order of October 22, 1990 scheduled elections for those judgeships (among others) for November 6, 1990 and if runoffs were required, for December 8, 1990 and the order authorized those persons elected to take office and serve provisionally as is set forth in Part III of the order. The Supreme Court, by its orders of November 2 and 5, 1990, set aside that portion of this court's order which authorized elections for judgeships which have not been precleared and enjoined the state

officials from conducting those elections.

Because the scheduled elections were enjoined, no person was elected to any of those judgeships and plaintiffs seek to enjoin the state from allowing those offices to be filled until the state has complied with the provisions of Section 5.

At present three of those offices are filled by incumbent judges whose terms expired on December 31, 1990. The other position has been filled by appointment by the Supreme Court of Louisiana under state law.

While the October 22, 1990 order may not authorize provisional filling of these specific judgeships, the spirit of the order is to avoid disruption of Louisiana's judiciary to the extent

possible until the preclearance issues are finally resolved. All of these judgeships were created and filled years ago. While one does not have an incumbent because of the retirement of the incumbent, each is an integral part of Louisiana's existing judicial system. Their loss would impinge upon that system.

While the State defendants have not moved for amendment of the earlier order, the court sua sponte will amend it.

Accordingly, IT IS ORDERED that the order of October 22, 1990 is hereby amended so as to allow Division G of the Fourth Judicial District and Divisions E, F, and G of the Fourteenth Judicial District to be provisionally filled in accordance with and under the terms and restrictions of Part III of that order.

Baton Rouge, Louisiana, January 11 , 1991.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

/s/ John V. Parker
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

No. 90-952 (4)

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

---

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Is the failure to preclear voting changes under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, automatically cured by the preclearance of subsequent or related voting changes in the same election district?

2. Did the district court err in failing to enjoin elections for state court judgeships held pursuant to voting changes to which the United States Attorney General objected under Section 5?

3. What relief should be ordered by this Court in a situation where the federal district court improperly permitted elections to occur pursuant to voting changes to which the Attorney General objected under Section 5?

PARTIES

The parties in the court below are as follows:

Plaintiffs: Janice C. Clark, Orscini L. Beard, Eddie G. Crawford, Norbert C. Rayford, Voter Information Project, Inc., Louis Scott, Sylvia Cooks, Connie Sadler, Lloyd Dangerfield, Tom Nelson, Albert Richard, Brenda Ford, Edward Larvadain, and Josie Frank, on behalf of themselves and all others similarly situated.

Plaintiff-Intervenor: The New Orleans Chapter of the Louis A. Martinet Society.

Defendants: Charles "Buddy" Roemer, in his capacity as Governor of Louisiana; Fox McKeithen, in his capacity as Secretary of State of Louisiana; and William Guste, in his capacity as Attorney General of Louisiana.

Defendants-Intervenors: The Louisiana District Judges Association and the Orleans Parish Trial Judges Association.

The plaintiffs in the court below are appellants in this Court. The defendants and defendant-intervenors in the court below are appellees in this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-952

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

---

BRIEF FOR APPELLANTS

OPINIONS BELOW

The order and opinion of the three-judge district court dated October 31, 1990 is published at 751 F.Supp. 586 (M.D. La. 1990), and is reproduced in the appendix to the Jurisdictional Statement. (J.S. App. 1a). The three-judge district court's order of October 22, 1991 is published as an appendix to the October 31 order and opinion at 751 F.Supp. 586, 598 (M.D. La. 1990), and is reproduced in the appendix to the Jurisdictional Statement. (J.S. App. 68a). The October 2, 1990 order of the three-judge district court is unpublished and is reproduced in the appendix to the jurisdictional statement (J.S. App. 85a), as is the September 28, 1990 order of that court. (J.S. App. 90a).

JURISDICTION

This is an appeal from the denial of injunctive relief by a three-judge district court, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1253

and 42 U.S.C. Section 1973c. The district court's orders were entered on September 28, 1990, October 2, 1990, and October 22, 1990, and modified on October 31, 1990. A notice of appeal from the September 28, October 2, and October 22 orders was filed on October 26, 1990. (J.S. App. 188a). A supplemental notice of appeal from those orders and the October 31 modification was filed on November 6, 1990. (*Id.* at 190a). The Jurisdictional Statement was filed and the appeal was docketed on December 14, 1990, and this Court noted probable jurisdiction on January 18, 1991.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, is repeated verbatim in the appendix to the Jurisdictional Statement. (J.S. App. 193a).

STATEMENT OF THE CASE

Section 5 of the Voting Rights Act provides that covered jurisdictions, including the State of Louisiana, may not implement voting changes unless they obtain preclearance by persuading the United States Attorney General or the United States District Court for the District of Columbia that the changes do not have a discriminatory purpose or effect. In the event preclearance is denied by the Attorney General, a covered jurisdiction may still seek preclearance by filing a Section 5 declaratory judgment action in federal district court in the District of Columbia.

Over the past twenty-five years, Louisiana has made a number of changes in its laws regarding judicial elections, including the creation of many new elected judgeships. Some of the changes were submitted for Section 5 preclearance shortly after they were enacted, but many were not. Nevertheless, the State implemented all of the voting changes, including those that had not been submitted. The result was a state court judiciary composed of a combination of precleared and uncleared judgeships,

and even within specific judicial districts some of the judgeships were precleared and others were not.

This appeal grows out of the failure of a three-judge federal district court in the Middle District of Louisiana to enjoin elections for certain Louisiana state court judgeships held pursuant to voting changes to which the United States Attorney General objected under Section 5. The appellants are black registered voters and a voting rights organization in Louisiana, and are plaintiffs in the district court below. They filed this class-action litigation in 1986 challenging the use of at-large voting in multi-member election districts for state trial and intermediate appellate court judges in Louisiana under Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, and the Fourteenth and Fifteenth Amendments, and also challenging under Section 5 a few unprecleared voting changes involving judicial elections. As provided by Section 5, the claims arising under that section of the Act were assigned to a three-judge district court, while the Section 2 and constitutional claims were assigned to a single judge.

After the initial complaint was filed, the plaintiffs uncovered a number of additional unprecleared judicial election voting changes. On July 30, 1987, an amended complaint was filed adding claims under Section 5 involving those changes. (J.A. 15).

Once the plaintiffs moved to amend the complaint and add the new Section 5 violations, the State submitted the changes to the United States Attorney General for Section 5 clearance. In letters dated September 23, 1988 (J.S. App. 108a) and May 12, 1989 (J.S. App. 127a), the Attorney General objected under Section 5 to many of the changes, including the creation of some 47 judgeships elected through at-large voting with designated posts and a majority vote requirement. In the meantime, on September 27, 1988, the three-judge court enjoined the impending fall, 1988 elections for the four uncleared judge-

ships scheduled to be elected at that time. (J.S. App. 98a). Those four judgeships were created in 1987, (*id.*), and had not been filled prior to the elections.

Despite the Attorney General's Section 5 objections and the September, 1988 injunction from the district court, the State did not seek clearance in the United States District Court for the District of Columbia. Instead, State officials proceeded with plans to hold the fall, 1990 elections for both cleared judgeships *and* uncleared judgeships to which the Attorney General had objected. (1990 is the regular election year for all of the state's district court (trial court) judgeships and many of the court of appeal judgeships). Shortly after learning of this, the plaintiffs filed on July 23, 1990 a motion asking the three-judge district court to enjoin the elections involving uncleared voting changes. (J.A. 48).[1]

On September 17, 1990, while the Section 5 injunction motion was pending, the Attorney General responded to a request for reconsideration by withdrawing his objection to eleven judgeships in Orleans Parish. (J.S. App. 136a). However, he refused upon reconsideration to withdraw the rest of the objections, saying the State had not carried its burden of proving the absence of a racially discriminatory purpose in creating and maintaining the voting changes encompassed by those objections. (*Id.* at 142a). The Attorney General also objected to four new judgeships created since the issuance of the earlier objection letters. (*Id.*).

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[1] At the time of the plaintiffs' motion, the single judge hearing the Section 2 case already had found violations of Section 2 in eleven judicial districts and had enjoined further elections in those districts until a remedial plan could be imposed. Accordingly, the plaintiffs did not include any of the judgeships in those eleven districts in their July 23 Section 5 injunction motion. Once that Section 2 injunction was lifted on October 2, 1990, the plaintiffs immediately added the uncleared voting changes in those eleven districts to their Section 5 injunction motion. (J.A. 93).

The United States entered an appearance in the district court and filed a memorandum *amicus curiae* supporting the plaintiffs' motion for an injunction. On September 28, 1990, a hearing was held at the conclusion of which the three-judge court entered an interim order that permitted the regularly scheduled primary elections on October 6 and the runoff on November 6 to proceed for the time being, but enjoined the winning candidates for any uncleared judgeships from taking office. (J.S. App. 90a). The three-judge court later said it permitted the elections to proceed in this provisional manner because it was uncertain about the applicability of Section 5. (*Id.* at 32a). The court also asked for further briefing on the issues. Because the three-judge court's action was not final, and because it left open the possibility that the election results would be nullified, the plaintiffs did not at that time take the extraordinary step of seeking injunctive relief from this Court.

Also on September 28, the Fifth Circuit sitting en banc released its decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), holding that Section 2 of the Act does not apply to judicial elections. Accordingly, on October 2, 1990, the single judge hearing the Section 2 claims lifted an injunction he previously had issued against elections under the existing at-large system in eleven judicial districts where he found a Section 2 violation. In the wake of lifting the injunction, he also ordered that elections in those districts proceed under an accelerated special election schedule, with qualification to occur October 3-5, the first primary on November 6, and the runoff on December 8. (J.S. App. 81a). Given that the Attorney General had objected to some of the judgeships in those eleven districts, the three-judge court issued a separate order on October 2 stating that the elections for those uncleared judgeships would go forward on the same special election schedule, but the winners would be enjoined from taking office. (*Id.* at 85a).

On October 9, the Attorney General sent another letter to the State saying the previously interposed Section 5 objections would not be withdrawn despite the Fifth Circuit's decision in *LULAC*. (J.S. App. 168a).

After further briefing, the three-judge court held another hearing on October 18, 1990. On October 22, the court issued an order that denied the injunctive relief requested by the plaintiffs and permitted the elections to proceed and the winners to take office. (J.S. App. 68a). That order was followed by an October 31 opinion explaining the rationale for the October 22 order and modifying it with respect to one judgeship (which is discussed in n. 2 below). (*Id.* at 1a). In the October 22 order and the October 31 opinion, the district court ruled, first, that many of the voting changes to which the Attorney General objected had already been automatically cleared because subsequent or related voting changes in the same judicial districts had been cleared. Second, for those judgeships which the district court conceded had never been cleared, the court permitted the elections to occur and the winners to serve "provisionally" while the State seeks clearance through a declaratory judgment action in the United States District Court for the District of Columbia. Each of these holdings is discussed in more detail.

A. The District Court's Holding That The Clearance Of Voting Changes Automatically Clears Prior Or Related Voting Changes In The Same District.

The three-judge court held there was no need for clearance of a large number of the changes to which the Attorney General objected because subsequent voting changes in the same judicial districts had been submitted and cleared. For example, said the court, the clearance of the creation of a seventh at-large judgeship in a district would necessarily clear the creation of the previous six at-large judgeships. (J.S. App. 25a). Thus, even though one or more of the previous six may not have

been submitted until after clearance of the seventh, and even though the Attorney General objected once the earlier judgeships were submitted, the district court held the Attorney General's objections to be invalid. The court said:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(*Id.* at 27a-28a).[2]

Most of the situations in which the district court applied this rule involved the creation of at-large judgeships in districts where subsequently created at-large judgeships were submitted and precleared. However, the district court also nullified the Attorney General's objections in four other situations that do not fit the same pattern. (J.S. App. 51a-52a). They are as follows:

- The Attorney General objected to Act 305 of 1975, which created designated divisions (or posts) within the First Circuit Court of Appeal. (J.S. App. 112a-113a,

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[2] The judgeships that the district court held to have been cleared despite the Attorney General's objections are listed in Part I of the October 22 order (J.S. App. 70a-71a). In addition, on October 31, the district court also held that Division B of the 20th district was cleared notwithstanding the Attorney General's objection. (J.S. App. 53a). It should be noted here that the district court need not have listed in Part I of its October 22 order the judgeships of the 17th and 32nd judicial districts. The plaintiffs are unaware of any failure to obtain clearance of those judgeships and never have sought any injunction against them. The district court has been informed of the plaintiffs' position on this. (J.S. App. 51a, n.73). Other than the judgeships from the 17th and the 32nd, all of the judgeships listed in Part I of the October 22 order as well as Division B of the 20th district have been the subject of an objection by the Attorney General. (J.S. App. 121a-126a).

126a). The district court said, however, that the preclearance in 1981 of Act 3 of 1981, which added designated divisions to the *other* Circuit Courts of Appeal automatically precleared designated divisions in the First Circuit. (*Id.* at 52a and n. 74) (The letter submitting Act 3 of 1981, along with relevant excerpts from the act itself and the Attorney General's preclearance letter, were introduced as exhibit D-6, 9/28/90 hearing, and are reproduced in J.A. 153).

• The Attorney General also objected to the at-large circuitwide election of one Court of Appeal judgeship in the Second Circuit and one in the Third Circuit, both created by Act 114 of 1975. (J.S. App. 126a). Nevertheless, the district court said these judgeships had been automatically precleared by the Attorney General's 1981 approval of Act 3 of 1981, which added a number of judgeships to the various circuits of the Courts of Appeal. (*Id.* at 51a-52a). Act 3, however, did not add any new circuitwide at-large judgeships to the Second Circuit, but only added some new judgeships to be elected from smaller districts within the circuit. Moreover, Act 3 added no new judgeships at all to the Third Circuit. (J.A. 158-159).[3] Thus, the at-large circuitwide judgeships were retroactively cleared, according to the district court, by the clearance of a later act that added no new circuitwide judgeships.

• Act 635 of 1979, which split the old 10th judicial district into the new 10th and the new 39th, was also the subject of the Attorney General's objection. (J.S. App. 122a, 154a-156a, 163a). The district court nevertheless concluded that "the Attorney General specifically pre-

[3] The State's letter submitting Act 3 of 1981 for preclearance identified the changes from prior law that were brought about by Act 3. (J.A. 157-163). Some confusion may be generated by the chart in that letter which also identified judgeships created by Act 661 of 1980. (*Id.* at 158-159). However, as the letter stated, Act 661 of 1980 was never implemented and was repealed by Act 3 of 1981. (*Id.* at 160). Thus, the judgeships created by Act 661 are irrelevant.

cleared the division of the 10th and 39th Judicial Districts into two separate districts when he approved judicial positions for both districts." (*Id.* at 52a). However, no evidence was presented to indicate that the Attorney General precleared judicial positions in either district. Act 635 (reproduced in relevant part in the appendix to this brief) provided for a special referendum election among the voters of the old 10th judicial district to approve the split, and provided that if voter approval was obtained, the two existing judges would remain with the 10th and a new judge would be added in the 39th. The only preclearance relative to the two districts came in the Attorney General's letter of November 13, 1979, which by its terms precleared only "the special election for the Tenth Judicial District" called to obtain voter approval for the split and nothing else. (J.A. 101). The State defendants never put into evidence the submission letter accompanying Act 635. The stipulated chart filed with the district court shows that no additional judgeships have been created or approved in either the 10th district or the 39th district since Act 635 of 1979. (*Id.* at 214-215, 220).

• Also included within the Attorney General's objections was Act 34 of the Special Session of 1981, which added the judgeship in Division B to the 20th judicial district. (J.S. App. 122a). (Act 34 is reproduced in the appendix to this brief). However, the district court said that exhibit D-4 in the court below "clearly shows that the split of District 20 into two parishes and the creation of Division B was expressly submitted and approved by the Attorney General." (J.S. App. 53a). Exhibit D-4 deals with the submission of Act 568 of the 1981 regular session, which provided for a referendum to obtain voter approval for the split of the old 20th judicial district into the new 20th and the new 40th, and the creation of a judgeship for the new 40th. (J.A. 117).[4] As noted in

[4] Actually, there are two exhibits D-4, one from the September 28, 1990 hearing and the other from the October 18, 1990 hearing.

the Attorney General's October 19, 1981 response to the preclearance submission—also part of exhibit D-4—the proposition did not receive voter approval in the October 17 referendum and the Attorney General therefore made no preclearance determination. (*Id.* at 118). Thus, exhibit D-4 does not indicate preclearance of anything relative to the 20th judicial district. After the defeat of that referendum, the legislature enacted Act 34 of the 1981 special session which left the old 20th judicial district intact and added Division B. It was approved by the Governor on November 19, 1981. The act was not submitted for clearance until after the institution of this litigation, and as noted earlier, was the subject of the Attorney General's objection. (J.S. App. 122a).

In those four situations, as well as in the large number of situations involving uncleared at-large judgeships in districts where subsequently created at-large judgeships were submitted and precleared, the district court's decision invalidated the Attorney General's objections under Section 5.

B. The District Court's Ruling Permitting Elections For Judgeships It Conceded Had Not Been Cleared.

With respect to the remainder of the judgeships to which the Attorney General objected, all in districts where no other seats subsequently were created or precleared, the district court held that the failure to obtain clearance violated Section 5.[5] Despite the absence of clearance,

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Exhibit D-4 from the September 28 hearing contains the submission letter for Act 568 of the 1981 regular session, the act itself, and the Attorney General's October 19, 1981 response to the submission. (J.A. 117, 120, 127). Exhibit D-4 from the October 18 hearing is another copy of the Attorney General's October 19, 1981 response to the submission, with no other documents attached. (J.A. 205).

[5] Those judgeships are listed in Part II of the district court's October 22 order. (J.S. App. 72a-73a). However, the district court mistakenly included Division D of the 34th district, which has in fact been precleared as acknowledged by this Court's November 5

however, the district court said elections for those same judgeships could proceed as scheduled, with the winners being permitted to take office and serve "provisionally." The district court gave the State ninety days to file a declaratory judgment action seeking clearance in the District of Columbia (or to persuade the Attorney General to reconsider and grant clearance), with the winning candidates remaining in office during the course of the litigation in the District of Columbia. If the State loses the litigation, said the district court, those judges will continue in office for 150 days "after the finality of judgment in that case." If the State prevails, the judges may serve their full terms. (J.S. App. 74a-77a).

C. Subsequent Proceedings.

On October 29, 1990, the plaintiffs filed an application for injunction pending appeal in this Court. The application was granted in part on November 2, 1990, and the Court enjoined the November 6 and December 8 elections for those seats the district court conceded were uncleared. *Clark v. Roemer*, 111 S.Ct 376 (1990). The Court did not grant the application insofar as it sought to prevent the State from permitting people to take office who had already won election to uncleared seats either by being unopposed or having been chosen in the October 6 election that the district court permitted to occur. In addition, the application was not granted insofar as it sought to enjoin elections for those seats to which the Attorney General had objected but which the district court said had been automatically cleared by the preclearance of subsequent or related voting changes in the same districts. This Court conditioned the injunction

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modification of its November 2 injunction pending appeal. *Clark v. Roemer*, 111 S. Ct. 399 (1990). In addition, Division B of the 6th District has since been precleared by the Attorney General on November 20, 1990. (J.S. App. 184a). All of the other judgeships listed in Part II are the subject of the Attorney General's Section 5 objections. (*Id.* at 121a-125a, 132a, 166a-167a, 180a).

upon the timely filing of a jurisdictional statement appealing the district court's orders. The jurisdictional statement was filed December 14, 1990, and this Court noted probable jurisdiction on January 18, 1991.

Meanwhile, on January 11, 1991, the three-judge district court entered an order permitting incumbents to hold over in the offices for which this Court enjoined elections, and permitting any vacancies in those seats to be filled by appointment pursuant to Louisiana law. The order allows the incumbents or their appointed replacements to stay in office until 150 days after the conclusion of any litigation in the District of Columbia. (J.A. 268).

On January 19, 1991, the State of Louisiana filed a Section 5 declaratory judgment action in the United States District Court for the District of Columbia seeking clearance of the judgeships which the federal district court in Louisiana held not to have been cleared. *State of Louisiana v. United States*, No. 91-0122 (D.D.C.). The filing came on the next to last day of the 90-day deadline set by the October 22 order of the federal district court in Louisiana.

As for the Section 2 claims in the Louisiana litigation, they were dismissed by the single-judge district court in conformity with the en banc Fifth Circuit decision in *LULAC*. The plaintiffs noticed an appeal to the Fifth Circuit, and then filed in this Court a petition for certiorari before judgment in the Court of Appeals. *Clark v. Roemer*, No. 90-898. The petition is pending. Meanwhile, on January 18, 1991, this Court granted four petitions for certiorari growing out of two separate cases to decide the applicability of Section 2 to judicial elections, and the resolution of those cases will directly affect the Section 2 claims in the present case. *Chisom v. Roemer*, No. 90-757 (consolidated with) *United States v. Roemer*, No. 90-1032; *Houston Lawyers' Association v. Attorney*

General of Texas, No. 90-813 (consolidated with) *LULAC v. Attorney General of Texas*, No. 90-974. The constitutional claims in the present litigation are still pending before the single-judge district court, which has stayed proceedings on those claims until the applicability of Section 2 is resolved by this Court.

SUMMARY OF ARGUMENT

1. By its holding that preclearance of voting changes also cleared prior and related changes in the same election district, the district court nullified many of the Attorney General's objections. This was based on the district court's conclusion that the Attorney General's preclearance of a voting change "not only approves the amended portion [of a statute] but necessarily approves the older, reenacted part, which forms part of the new act." (J.S. App. 27a). That conclusion is directly contradicted by this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984), which said that "submission of a particular change does not encompass all prior changes—precleared or not—that have been made since the Act's effective date in 1964." *Id.* at 255, n.26. *McCain* requires deference be paid to the Attorney General's determination in this case that preclearance of various voting changes did not clear earlier changes, but the district court ignored the Attorney General's view. If the district court's reasoning were to prevail, discriminatory voting changes would go undetected. Covered jurisdictions would be encouraged to withhold submission of discriminatory changes, instead waiting to obtain preclearance of later and more innocuous changes that would retroactively clear the earlier, discriminatory measures. The Attorney General's enforcement responsibilities would be seriously undermined inasmuch as each submission would require a search into all prior and related voting changes in the election district, no matter how many, to determine if they were precleared.

2. This Court never has held that a district court may allow elections to proceed pursuant to voting changes

falling clearly within Section 5's preclearance requirement and to which the Attorney General has objected. Yet the district court did just that. It concluded, in effect, that Section 5 objections by the Attorney General may be suspended and uncleared changes may be implemented for as long as it takes the covered jurisdiction to litigate a declaratory judgment action in federal district court in the District of Columbia. The district court's error is apparent from the fact that this Court, in the present case and in prior cases, has itself enjoined elections in order to enforce the Attorney General's Section 5 objections. This is in accord with prior decisions of this Court stating very clearly that uncleared changes may *not* be implemented. No decision of this Court has modified that principle simply because of the pendency of Section 5 litigation in the District of Columbia.

3. Because of the district court's errors, several illegal elections occurred that should not have occurred. Given that preclearance already has been sought from the Attorney General and denied, *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-183 (1985) requires that the results of the illegal elections be set aside. The case should be remanded to the district court for the imposition of any further relief that is necessary. However, this Court should impose a time limit beyond which the district court may not permit the continuing operation of the uncleared judgeships in the absence of a lawful election plan. Otherwise, the district court will allow the judgeships to remain filled during the entire time it takes to litigate the Section 5 declaratory judgment action in the District of Columbia. None of this Court's cases suggest that a jurisdiction may continue to implement voting changes to which the Attorney General already has objected simply because the jurisdiction is pursuing a declaratory judgment action. That course of action will delay too long the enforcement of Section 5 and will reward Louisiana officials for their dilatory conduct in failing to initiate that litigation sooner.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PRECLEARANCE OF VOTING CHANGES AUTOMATICALLY CLEARS PRIOR AND RELATED VOTING CHANGES IN THE SAME JUDICIAL DISTRICT.

Section 5 provides that any voting change in a covered jurisdiction such as Louisiana may not be implemented until the jurisdiction obtains preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia stating that the change has no discriminatory purpose or effect. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982). This Court has held that the creation of new elected judgeships is a voting change that must be precleared under Section 5. *Brooks v. Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S.Ct. 288 (1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986).

In the present case, the district court held that a number of judicial election voting changes to which the Attorney General objected had already been cleared because of the preclearance of subsequent or related voting changes in the same judicial districts. In so doing, the district court nullified most of the objections made by the Attorney General in his September 23, 1988 and May 12, 1989 objection letters. The district court based its holding on the following rationale:

> When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

(J.S. App. 27a-28a).

The district court applied this rule to cover the Attorney General's objections to all at-large judgeships in districts where subsequently created at-large judgeships already had been precleared. In addition, the district court nullified the Attorney General's objections to four other Louisiana acts that do not fit this same pattern. (J.S. App. 51a-52a). Those are described earlier in this brief at pages 7-10, and will be discussed again later in this section of the brief. First, however, it is important to address the validity of the rule itself inasmuch as it is the basis for the district court's mass cancellation of the Attorney General's objections.

In *McCain v. Lybrand*, this Court explicitly rejected the type of rule upon which the district court based its decision in the present case, and unanimously held that the failure to preclear a voting change was *not* cured by preclearance of a second voting change even though the second change specifically reenacted the provisions included within the first. In fact, the second change in *McCain* was very similar to the subsequent changes in the present case in that it increased from three to five the number of seats and the number of residence districts within an existing at-large election system. 465 U.S. at 240. Justice Stevens' opinion for six members of the Court said, "submission of a particular change does not encompass all prior changes—precleared or not—that have been made since the Act's effective date in 1964." *Id.* at 255, n.26. The opinion added:

> When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Section 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Section 5 preclearance.

Id. at 256. *McCain*, therefore, directly contradicts the district court's holding here that preclearance by the

Attorney General "not only approves the amended portion [of a statute] but necessarily approves the older, reenacted part, which forms part of the new act." (J.S. App. 27a).

The district court's opinion attempted to distinguish *McCain* by referring to various Louisiana acts and submission letters:

> [We] find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990 order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance, support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature.

(J.S. App. 25a-27a, footnotes omitted). In a footnote to the second of the three sentences just quoted, the district court described the language of the Louisiana acts and the submission letters in evidence:

> In the submission to the Attorney General, the Act submitted, and in most cases the letter of submission, clearly and expressly states that the number of judges in a particular district is being increased from one number to another. This procedure is clearly distinct and different from the facts set forth in McCain v. Lybrand . . . .

(J.S. App. 26a, n.38).

Contrary to the district court's view, this in no way distinguishes *McCain*. Just as the acts and some of the submission letters in the present case stated that the number of judges in a given district was being increased from one number of another (such as six to seven), the subsequent legislation actually precleared by the Attorney General in *McCain* described the change from three council members to five. 465 U.S. at 240.

Thus, the district court erred as a matter of law when it concluded that a description of the change from one number of judges to another in a particular judicial district is sufficient under Section 5 to submit to the Attorney General all prior voting changes incorporated in the newly amended statute pertaining to the particular judicial district. *See McCain*, 465 U.S. at 258 (stating that a similar district court ruling in that case was error "as a matter of law").

Moreover, nothing in the factual record indicates that the State's occasional submissions of various judgeships for preclearance prior to this lawsuit were accompanied by, or specifically included, requests for clearance of earlier uncleared voting changes in the same judicial districts. Only five submission letters were put into the record by the defendants, and they are reproduced in the Joint Appendix. (J.A. 105, 110, 120, 151, 155).[6] Of those, two did not give any description of the voting changes being made, but simply announced that the acts were being submitted for preclearance. (J.A. 105-106, 151-152).[7] The other three described the particular changes encompassed in the acts submitted by noting, for example, the changes in the "1st Judicial District, from 8 to 9 judges." (J.A. 111-114, 121-124, 157-163).[8] None of them informed the Attorney General of prior voting changes that were uncleared and were being submitted along with the new voting changes. In the absence of such information, according to *McCain*, the submissions of the new changes cannot be deemed submissions of prior

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[6] These five submission letters are included in exhibits D-2, D-3, D-4, D-5, and D-6 of the September 28, 1990 hearing.

[7] These are in exhibits D-2 and D-5 from the September 28 hearing.

[8] These are in exhibits D-3, D-4, and D-6 from the September 28 hearing.

changes in the same districts. *Id.* at 256-257. In the event the district court's ruling on this point is considered a finding of fact, it is clearly erroneous.

Apparently, the district court in the present case failed to understand that when an act changes the number of judges from six to seven, or the number of council members from three to five as in *McCain*, the Attorney General is called upon only to examine the evidence of discriminatory intent and impact surrounding that specific change. The Attorney General is not called upon to examine all prior changes in the election system that happen to be recodified by the new act, such as those changing from one at-large judgeship to two, two to three, three to four, and so on. As this Court said in *McCain*, "the preclearance procedures mandated by § 5 of the Voting Rights Act focus entirely on *changes* in election practices" that are submitted to the Attorney General. 465 U.S. at 251 (emphasis in original).

McCain also emphasized that deference should be given to the United States Department of Justice when it determines that its preclearance of later legislation did not clear earlier legislation. *Id.* at 255-256. Here the Justice Department's Section 5 objections and its *amicus curiae* position in this litigation demonstrate that the Attorney General did not and does not intend for the preclearances of later legislation creating judgeships in Louisiana to have encompassed earlier voting changes in the same judicial districts. By ignoring the Justice Department's position, the district court substituted its judgment for that of the Attorney General in holding that the later preclearances incorporated the earlier changes.

In addition, the State of Louisiana's own actions demonstrate that its officials did not believe the unprecleared voting changes to have been later cleared by the

Section 5 approval of other voting changes. Once the plaintiffs moved in 1987 to amend their complaint to include all of the unprecleared judicial voting changes they had uncovered, the State submitted those changes to the Attorney General for Section 5 clearance (J.S. App. 109a-110a), after which the Attorney General interposed his objections. Had State officials truly believed that most of those voting changes were already retroactively cleared, there would have been no reason to submit them for clearance. Only when the plaintiffs moved to enjoin the elections for uncleared judgeships during the 1990 statewide election cycle did the State defendants offer this belated contention that the voting changes already had been cleared.

Not only does the district court's decision contravene the holding of *McCain v. Lybrand*, but it also conflicts with this Court's affirmance of *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). In *Haith*, a 1967 North Carolina act (Chapter 997) added one judgeship to each of four judicial districts and was implemented without being submitted for preclearance. 618 F.Supp. at 412. The State defendants there claimed those same judgeships had also been included in later legislative enactments that were precleared. *Id.* The district court in *Haith*, citing *McCain v. Lybrand*, said the later preclearance made no difference and enjoined elections for the judgeships in question. *Id.* at 413-414. The issue of the subsequent preclearance was raised by the State defendants in their jurisdictional statement in that case (no. 85-1066, J.S. at 20-21), yet this Court affirmed the lower court without opinion. 477 U.S. 901 (1986).

With the passage of Section 5, Congress intended to provide a mechanism for review of all voting changes in the covered jurisdictions in order to prevent racial discrimination. The holdings in *McCain* and *Haith v. Martin* are in keeping with that intent. By contrast, the

district court's reasoning in the present case would permit potentially discriminatory voting changes to go unreviewed and uncorrected. Consider, for example, the district court's statement that the preclearance of the creation of a seventh judgeship in a judicial district would necessarily approve the previous six. (J.S. App. 25a). A covered jurisdiction may decide to expand the number of judges elected at-large in a majority white district from one to six rather than divide that district into two smaller judicial election districts, one majority black and one majority white, and may do so with the stated discriminatory purpose of preventing the election of black judges. If the changes from one to six are implemented and not submitted, the Attorney General will have no way of reviewing the evidence of discrimination. If years later a seventh judge is added without discriminatory purpose and is submitted, the Attorney General will be confronted only with the change from six to seven. There will be no indication to the Attorney General that the evidence of discrimination surrounding the prior changes should be examined. Yet, under the district court's rule, the preclearance of the nondiscriminatory change from six to seven automatically would preclear the prior discriminatory changes. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 136 (1978).

Indeed, the District Court's rule would encourage jurisdictions to forego the submission of discriminatory election changes for preclearance, comfortable in the knowledge that the measures later could be silently cleared through the submission of subsequent and more innocuous changes.

The district court's rule also would seriously hamper the Attorney General's discharge of his Section 5 re-

sponsibilities. With each submission of a voting change, the Attorney General would be required to go back and determine whether all prior changes in that voting district had been submitted for preclearance. If some had not been precleared, examination of those changes would be necessary even though the covered jurisdiction had not submitted the prior changes. That would be too great a burden for the Attorney General, who already must review thousands of voting changes each year. Moreover, it would become extremely difficult for the Attorney General to dispose of these thousands of changes within the sixty days prescribed by Section 5, thus impinging upon what Congress intended as a "speedy alternative method of compliance" that would enable covered jurisdictions to avoid frequent litigation in the District of Columbia. *Morris v. Gressette*, 432 U.S. 491, 503 (1977). Section 5 places upon the covered jurisdictions the responsibility of submitting to the Attorney General voting changes, and informing the Attorney General of the nature of those changes. *McCain v. Lybrand*, 465 U.S. at 249. The district court's decision reverses that principle, and is inconsistent with the structure and the efficient enforcement of the Act.

In addition, it is important to note that the district court's rule is very expansive, covering not only prior judgeships added to existing election districts, but *all* voting changes that are later reincorporated into a statute for which the Attorney General approves any amendment.

In fact, the district court invoked its rule (J.S. App. 51a-52a) in the course of automatically clearing changes that had little relationship to the subsequent changes actually considered and precleared by the Attorney General:

- As noted earlier, the district court held that the otherwise uncleared enactment of designated divisions (or posts) for the First Circuit was automatically cleared by the later approval of designated divisions in other circuits. (J.S. App. 51a-52a and n.74; see pages 7-8 of this brief). However, the Attorney General never had the opportunity prior to that time to evaluate the impact of designated posts as applied to the specific situation in the First Circuit. Once the State finally gave him that opportunity by submitting the voting change, the Attorney General concluded that the designated divisions were discriminatory in light of the particular demographics of the First Circuit. (J.S. App. 112a-113a).

- Similarly, the district court held that the otherwise uncleared creation of at-large circuitwide judgeships in the Second and Third Circuits was automatically cleared by the approval of a later act creating new Court of Appeals judgeships from smaller districts within the Second Circuit and creating no new judgeships in the Third Circuit. (J.S. App. at 52a; see page 8 of this brief). In that situation, the Attorney General never had the opportunity to evaluate the change caused by the earlier creation of judgeships elected at-large from the entire Second Circuit and the entire Third Circuit.
- In addition, the district court said the split of the 10th and 39th districts was cleared when the only preclearance involved the Attorney General's approval of the holding of a referendum election proposing the changes. (See pages 8-9 of this brief). This is in direct conflict with *United States v. Board of Commissioners of Sheffield*, 435 U.S. at 137, in which this Court said preclearance of a referendum election does not necessarily constitute approval of the underlying change proposed in the referendum.
- One other mistake was made by the district court. It held that Division B of the 20th judicial district had been precleared because of a Section 5 submission regarding a referendum to consider splitting the 20th district and providing a new judge to sit in the new district. The referedum failed and the Attorney General therefore made no preclearance

determination at all. Division B was passed later and never submitted for preclearance. (See pages 9-10 of this brief).

These four instances indicate the extent to which the District Court's rule can lead to a perversion of Section 5. While each of the instances constitutes an error under Section 5, the appellants are of the view that this Court need not address them individually. Instead, it will suffice for this Court to reverse the district court because of its reasoning and vacate the judgment below, leaving the district court to sort out on remand the factual details surrounding each of these judgeships.

For all of these reasons, the district court's ruling on this issue should be reversed.

II. THE DISTRICT COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD PURSUANT TO UNCLEARED VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED UNDER SECTION 5.

When Congress passed the Voting Rights Act of 1965, it included Section 5 as a key weapon in the battle to stop what this Court called the "insidious and pervasive evil" of racial discrimination in voting that "had been perpetuated in certain parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

> To prevent any future circumvention of constitutional policy, Congress adopted Section 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims.

United States v. Board of Commissioners of Sheffield, 435 U.S. at 121.

By ordering elections to proceed even for judgeships it conceded should have been precleared and were not, the district court shifted the advantages of time and inertia back to the State of Louisiana and placed the burden of delay on the voters whom Section 5 was intended to protect. Even though the Attorney General, in fulfilling his Congressionally authorized responsibility, determined that these voting changes were racially discriminatory, the district court allowed the state to continue implementing the changes.[9] Indeed, the district court holding permits the state to enforce the changes for the entire time it takes to litigate to conclusion the declaratory judgment action in the District of Columbia.

There is no authority for the district court's action. This Court never has said that a district court may permit elections to go forward in circumstances where it is conceded that Section 5 applies and where the Attorney General has interposed a valid objection. To the contrary, the Court itself has enjoined elections in such situations in the wake of district court failures to do so. It did so in the present case, which strongly indicates that the district court erred, and it has done so in the past. *See, e.g., Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). Indeed, an injunction has issued even where the Attorney General has yet to make a preclearance decision. *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers).[10]

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[9] Neither the district court in Louisiana nor this Court on appellate review has the authority to second-guess the Attorney General's substantive determination. *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977).

[10] In *Georgia v. United States*, 411 U.S. 526 (1973), the Attorney General objected to a state legislative redistricting plan, the district court enjoined use of the plan, and this Court stayed enforcement of the injunction pending appeal. *Id.* at 528. However, in that case, questions existed about whether Section 5 covered legislative redistricting plans and whether the Attorney General's objections

These injunctions are in keeping with the clear statements of the Court to the effect that uncleared changes are unenforceable. "No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977). Uncleared changes "are not now and will not be effective as laws until and unless precleared pursuant to Section 5." *Connor v. Waller*, 421 U.S. 656 (1975). "[T]he change in election procedure is subject to Section 5, and the . . . *courts may not further implement that change* until the parties comply with Section 5." *Hathorn v. Lovorn*, 457 U.S. at 270 (emphasis added).

This principle never has been modified by the Court simply because of the pendency of a preclearance request, whether with the Attorney General or the federal district court in the District of Columbia. To the contrary, the election in *Lucas v. Townsend* was enjoined even though a Section 5 submission was pending before the Attorney General and the possibility existed that preclearance would be granted within less than two months. *Lucas v. Townsend*, 486 U.S. at 1303.

All of this is settled law, yet it was ignored by the district court. According to the district court, its reasons for permitting the elections to occur despite the Attorney General's objections included its uncertainty about the applicability of Section 5, its concern about the impact of an injunction on the Louisiana justice system, and its reluctance to enjoin elections once qualifying and campaigning already had occurred. (J.S. App. 31a-37a). These are addressed in turn.

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were timely. Neither of those situations exists here with respect to the judgeships the district court conceded were uncleared. Furthermore, once *Georgia v. United States* was heard on the merits and this Court determined Section 5 was applicable, the Court ordered that no further elections proceed under the plan.

The district court said uncertainty existed about the applicability of Section 5 until this Court issued its summary affirmance of *Brooks v. State Board of Elections* on October 15, 1990, after all elections had been scheduled and after the October 6 primary had occurred. The district court's analysis ignored *Haith v. Martin*, which involved legislation that included a statute adding new judgeships to pre-existing judicial districts. 618 F. Supp. at 412-413. There, the district court held that preclearance was required for the addition of the new judgeships, and this Court affirmed. 477 U.S. 901 (1986). *Brooks* simply reconfirmed the principle of *Haith v. Martin*. Thus, the law has been clear for years and provides no justification for the district court's failure to enforce Section 5. Moreover, even if there had been confusion prior to *Brooks*, once that decision was issued the three-judge court should have immediately enjoined all further elections and brought the illegal process to a halt.

While the district court was concerned about the functioning of the Louisiana justice system, there was no reason to believe that simply enjoining the elections would cause substantial harm to the system. For instance, the district court could have permitted incumbents to hold over for a period of time sufficient to allow the Louisiana legislature to adopt and preclear a new election plan that would satisfy Section 5. Moreover, the administrative difficulties incurred by a jurisdiction as a result of objections from the Attorney General under Section 5 are no excuse for failing to enforce those objections.

The district court also justified its failure to act by noting that qualification and campaigning already had begun. In that connection, the district court said, "qualifying for some of these judicial positions had begun before any hearing was requested to enjoin these elections." (J.S. App. 32a). The court added this: "While the Court does not intend to place the blame on any one

party, the request for an injunction of the unprecleared judicial positions came very close to the October 6 election day." *Id.* at 33a-34a.

Clearly, the Court did not deny the motion for injunction because of its timing inasmuch as it did not "place the blame on any one party." Had it done so, it would have committed error. The fourth amended complaint, raising the Section 5 violations now at issue, was filed over three years ago, on July 30, 1987. (J.A. 15). The complaint specifically requested that the three-judge court hear the Section 5 claims, and requested an injunction against enforcement of all of the unprecleared changes. (*Id.* at 40). When the fall, 1988 election approached, the plaintiffs moved to enjoin scheduled elections for all uncleared seats (*id.* at 42), and the three-judge court granted the injunction. (J.S. App. 98a). Despite this prior injunction, State officials went ahead with candidate qualification in July of 1990 in direct violation of Section 5. As soon as the plaintiffs learned of this, they filed on July 23, 1990 their motion to enjoin the elections. (J.A. 48).

Thus, all parties and the district court have been on notice for years of the Section 5 claims and the plaintiffs' contention that elections for unprecleared seats should not be permitted. The plaintiffs sought and received an injunction in September of 1988, and as soon as they learned of the plans to hold elections for unprecleared seats in 1990, they filed another injunction motion well over two months prior to the October 6 primary. There was no lack of diligence sufficient to deny an injunction. *See, Lucas v. Townsend*, 486 U.S. at 1302 (injunction pending appeal granted even though an injunction from the district court was sought only a few days prior to the election).

Indeed, it was the State officials who created the problem by scheduling qualification and elections for seats to

which Section 5 objections had been lodged, and doing so without informing or seeking the permission of the three-judge court. The three-judge court exacerbated the problem by permitting the October 6 elections to occur provisionally, and also opening candidate qualification on October 3-5 for a whole new set of elections for uncleared seats. In effect, the district court created its own set of exigencies by allowing the election process to go forward provisionally, and then used those exigencies to justify completing the process, holding the elections, and letting the winners take office.

In support of its decision to allow the elections to proceed, the district court cited a number of cases. (J.S. App. 39a-47a). All are inapposite. In *Perkins v. Matthews*, 400 U.S. 379 (1971), *NAACP v. Hampton County Election Commission*, 470 U.S. 167 (1985), *Berry v. Doles*, 438 U.S. 190 (1978), and *Georgia v. United States*, 411 U.S. 526 (1973), elections already had been held, the winners had been in office for some time, and the only question before this Court was whether the elections should be set aside.[11] That is a different question from whether they should be held in the first place. Moreover, in all of those cases, this Court said that no future elections could be held under the unprecleared changes. *See, e.g., Perkins v. Matthews*, 400 U.S. at 397; *Georgia v. United States*, 411 U.S. at 541.

As for the district court's citation of *United States v. County Commission of Hale County, Alabama*, 425 F. Supp. 433, 436 (S.D. Ala. 1976) (three-judge court), *aff'd mem.*, 430 U.S. 924 (1977) (J.S. App. 44a), it is

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[11] As previously noted, this Court initially stayed a lower court injunction against an unprecleared state legislative election plan in *Georgia v. United States*, because of uncertainty over whether Seciton 5 was applicable and whether the Section 5 objection at issue was timely. On appeal of the merits, however, this Court found that the district court was correct and ordered reimposition of the injunction. 411 U.S. at 541.

not controlling because the district court's order permitting elections to go forward in that case despite the absence of preclearance was never appealed to this Court. The only appeal taken was by the county defendants who challenged the applicability of Section 5. (See the jurisdictional statement in No. 76-772). Thus, the district court here was incorrect when it said *Hale County* involved a situation where "the United States Supreme Court approved an order very similar to that issued by this court." (J.S. App. 44a).

Finally, in *Oden v. Brittian*, 396 U.S. 1210 (1969), cited by the three-judge court here (J.S. App. 44a-45a), Justice Black denied a stay because he said the substantive "legal issues are unclear," and because the three-judge district court had yet to consider the request for an injunction. *Id.* at 1211-1212. Neither of those circumstances apply in the present case.

Thus, none of the reasons given and none of the cases cited by the district court justify the district court's decision on this point.

As noted earlier, the law is very clear. Voting changes to which the Attorney General has objected may not be enforced. The district court's decision permitting elections to proceed is in error.

III. THE ELECTIONS THAT OCCURRED PURSUANT TO UNCLEARED CHANGES SHOULD BE SET ASIDE, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's errors, elections occurred that never should have occurred. Although this Court enjoined elections scheduled November 6 and December 8 for judgeships the district court conceded to be uncleared, candidates nevertheless were elected to and are serving in some of those judgeships because they were

unopposed or won on October 6 without the need for a November 6 runoff. In addition, the district court let elections go forward for those judgeships it deemed to have been cleared because of the clearance of subsequent voting changes.

Assuming the district court is reversed on the substantive issues in this case, the next question is what should be done about those elections that the district court improperly allowed to occur. For reasons explained below, the appellants suggest that the district court be ordered to set aside the illegal elections, and that the case be remanded to the district court for the consideration of further remedial relief. However, the district court should also be instructed that if it permits continued operation of the uncleared judgeships, it may do so only for a limited period of time (not past January 1, 1992) unless a new plan for election has been implemented that satisfies Section 5.

In *NAACP v. Hampton County Election Commission*, this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval . . . . [*I*]*f approval is not forthcoming*, the results of the March, 1983 election *should be set aside.*

470 U.S. at 182-183 (emphasis added). Preclearance had yet to be sought from the Attorney General in *Hampton County* because of a contention that the voting change was not covered by the Act. By contrast, in the present case, approval from the Attorney General was sought and denied over two and a half years ago, and reconsideration for the judgeships at issue has been sought and denied. Thus, the Attorney General's approval is not forthcoming, and pursuant to *Hampton County*, the elections should be set aside.

Once the elections are set aside, the matter should be remanded to the district court to consider what additional relief may be necessary in light of the rights of the plaintiff class to elections that satisfy Section 5 and the interests of the State in the keeping these judgeships operative.[12] However, this Court should set a time limit beyond which the uncleared judgeships must be declared vacant unless elections have been held curing the Section 5 objections.

A time limit is necessary so the district court will not permit the State to operate the uncleared judgeships until the conclusion of the District of Columbia litigation. The district court already provided in its October 22, 1990 order that judges elected to uncleared judgeships may stay in office until 150 days after that case is terminated. In its recent January 11, 1991 order, the district court said incumbents and appointees may hold office in the judgeships under that same timetable. (J.A. 268).

For the district court to adhere to that timetable on remand would simply replicate the error the district court made in the first place when it permitted elections to go forward, and would suspend for years the enforcement of the plaintiffs' rights provided by Section 5.[13] Louisiana would continue to benefit by having implemented judge-

[12] Among other things, the district court can determine in the first instance whether any special election relief is possible. *See, Hathorn v. Lovorn*, 457 U.S. at 270.

[13] Section 5 declaratory judgment actions in federal district court in the District of Columbia generally take quite some time. In *City of Rome v. United States*, 450 F. Supp. 378, 379 (D.D.C. 1979) (three-judge court), nearly two years passed between the filing of the complaint and the rendering of a decision by the district court, and another year went by before this Court's disposition of the case. 446 U.S. 156 (1980). The same three-year total span was taken up by district court proceedings and the appeal to this Court in *City of Richmond v. United States*, 376 F. Supp. 1344, 1351 (D.D.C. 1974) (three-judge court), *vacated and remanded*, 422 U.S. 358 (1975).

ships for which it never obtained preclearance. There would be absolutely no reason in the meantime for the State to pass and preclear new legislation that would cause these judges to be elected consistent with Section 5.

Section 5 by its terms nowhere authorizes the implementation and maintenance of uncleared changes during the course of the entire District of Columbia litigation if the Attorney General already has found the voting changes to be racially discriminatory. While the decisions in *Hampton County, Perkins v. Matthews*, 400 U.S. at 396-397, and *Berry v. Doles*, 438 U.S. at 192-193, suggested that courts in some situations can hold off setting aside elections to give the covered jurisdiction an initial opportunity to seek clearance, all of those were cases in which clearance never had been requested because of a contention that the voting change was not covered. None of them stands for the proposition that election results can be implemented in the face of an Attorney General's objection while the jurisdiction litigates in the District of Columbia.[14] Indeed, in *Hathorn v. Lovorn*, where the Attorney General already had objected to the voting change, this Court's order delineating the remedial options to be considered by a lower court never mentioned the possibility of permitting the state to continue enforcing the change if it sought preclearance in federal court in the District of Columbia. 457 U.S. at 270.

The State of Louisiana had an opportunity to initiate a Section 5 declaratory judgment action back when the Attorney General first interposed his objections in Sep-

[14] Failing to set aside the elections in the present case would be equivalent to permitting the covered jurisdiction in *Hampton County* to seek the Attorney General's approval, and if approval is not forthcoming, then to seek clearance in federal court in the District of Columbia, all the while leaving the winners of the illegal election in office. In *Hampton County*, of course, this Court made no provision for such a course of action, instead specifying that the elections should be set aside upon the Attorney General's denial of clearance.

tember of 1988, two years prior to the 1990 elections. The State did not do so. Indeed, it did not file in the District of Columbia until its back was to the wall as a result of the district court's order in the present case, and then it did so only on the next to last day available under the district court's deadline. The State's dilatory tactics should not be permitted to delay the enforcement of Section 5. As this Court noted in *Perkins v. Matthews*, "Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation." 400 U.S. at 396.[15]

Moreover, if the judgeships continue to be implemented during the pendency of the District of Columbia litigation and the *winners of the illegal elections* are allowed to occupy those seats, the district court's error in permitting the elections to go forward will be uncorrected in any way, and *Hampton County*'s directive that the elections be set aside will go unheeded. Even if the winners are not allowed to stay in office, and the positions are filled using some other method of selection—such as appointment under state law—the State will continue to benefit from the initial unlawful implementation of these uncleared voting changes.[16] On the other hand, the plain-

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[15] Louisiana's record regarding compliance with Section 5 is not unblemished. The district court in this case made the following statement:

> The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act of 1965. If this were the first time a three-judge court in the Middle District of Louisiana was confronted with the problem of hearing a suit seeking to enjoin an election because of the state's failure to obtain preclearance, the Court might avoid commenting on the matter.

(J.S. App. 7a, n.10).

[16] If the judgeships remain in operation, the winners should not be allowed to remain in office in light of *Hampton County's* directive that the elections be set aside. In that scenario, it would be necessary to fill the offices through some other means.

tiff class of black voters on whose behalf the Attorney General interposed the Section 5 objections will receive no relief during the pendency of the District of Columbia litigation inasmuch as the illegal judgeships will remain operational without any effort to cure the causes of the Section 5 objections. Section 5 requires more.

Thus, a time limit is necessary so that the enforcement of the Attorney General's Section 5 objections will not remain for years in limbo. A time limit of January 1, 1992 would give the district court an opportunity to consider the propriety of filling the seats through some method such as special elections. It also would provide an incentive and allow sufficient time for the legislature to go into special session to pass and preclear a new election plan providing for prompt elections. In the event this Court does not choose to specify a time limit, it should instruct the district court to set some time limit of its own so that these uncleared judgeships will not remain in operation for the entire length of the District of Columbia litigation.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the district court should be reversed.

Respectfully submitted,

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March 4, 1991

APPENDIX

APPENDIX

[From Louisiana Session Laws,
Regular Session of 1979]

ACT No. 635

Senate Bill No. 137. By: Mr. Kelly and Representative Fowler.

AN ACT

To amend and reenact the initial paragraph and Paragraph (10) of Section 477 of Title 13 of the Louisiana Revised Statutes of 1950, to amend said Section 477 by adding thereto a new Paragraph, to be designated Paragraph (39) thereof; to amend said Title 13 by adding thereto a new Section, to be designated as Section 621.39 thereof; to enact Paragraph (39) of Section 51 and amend and reenact Sections 241 through 244 all of Title 16 of the Louisiana Revised Statutes of 1950; to amend Chapter 2 of said Title 16 by adding thereto a new Part, to be designated Part XXXIX thereof and to be comprised of R.S. 16:901, all relative to the judicial districts of the state, to submit to the voters of the existing Tenth Judicial District, for their approval or disapproval, a proposition to divide the Tenth Judicial District, composed of the parishes of Natchitoches and Red River, by continuing the Tenth Judicial District composed of Natchitoches Parish and to establish the Thirty-Ninth Judicial District composed of Red River Parish; to provide for the continuation of the offices of the judges, district attorney, and assistant district attorneys of the Tenth Judicial District; to provide for the establishment of the offices of judge and district attorney of the Thirty-Ninth Judicial District and to authorize an assistant district attorney for said district; to provide for the election of a judge and a district attorney for the Thirty-Ninth

Judicial District; to provide for the additional salaries of the district attorneys of the Tenth and Thirty-Ninth Judicial Districts; to provide for the additional salaries of the assistant district attorneys of the Tenth Judicial District; to provide for the effective date of the division of the existing Tenth Judicial District and the establishment of the Thirty-Ninth Judicial District; to provide for the effectiveness of the Act; to provide with respect to matters generally and specifically related to the division of the Tenth Judicial District and the establishment of the Thirty-Ninth Judicial District; and to repeal Sections 245 and 246 of Title 16 of the Louisiana Revised Statutes of 1950 which were made obsolete by the placing of the language contained in those Sections in other provisions of law.

Be it enacted by the Legislature of Louisiana:

Section 1. The initial paragraph and Paragraph (10) of Section 477 of Title 13 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted, and Paragraph (39) of said Section 477 is hereby enacted, all to read as follows:

§ 477. Judicial districts

There shall be thirty-nine judicial districts in the state, the parish of Orleans excepted, and each district shall be composed as follows:

* * * *

(10) The parish of Natchitoches shall compose the Tenth District.

* * * *

(39) The parish of Red River shall compose the Thirty-Ninth District.

Section 2. Section 621.39 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 621.39. Thirty-Ninth judicial district

The Thirty-Ninth Judicial District Court shall have one judge.

* * * *

Section 6. There is hereby established the office of judge for the Thirty-Ninth Judicial District Court, to be composed of the parish of Red River as provided in this Act.

The judge herein provided for shall be elected at large from the parish of Red River.

The judge shall have the same qualifications and shall receive the same emoluments of office, compensation, and expense allowances, payable from the same sources and in the same manner, as is now or may hereafter be provided for the other judges of the district courts throughout the state.

The first judge elected to the judgeship shall be elected at the special election hereinafter provided for and shall serve for a term which shall expire at the same time as is provided by law for the other judges of the district courts throughout the state.

* * * *

Section 8. The governor, within fifteen days after the effective date of this Section, shall call a special election, to be held at the same time as the gubernatorial primary elections to be held in 1979, to submit to a vote of the voters of the existing Tenth Judicial District, being the parishes of Natchitoches and Red River, for their approval or disapproval as provided in Section 15 of Article V of the Louisiana Constitution of 1974, the following proposition in substantially the following form:

> FOR the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Red River Parish, and continuing the Tenth Ju-

dicial District composed of Natchitoches Parish as provided by Act No. 635 of the 1979 Regular Session of the Louisiana Legislature.

and also:

AGAINST the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Natchitoches Parish as provided by Act No. 635 of the 1979 Regular Session of the Louisiana Legislature.

The secretary of state shall fill in the number of this Act in the propositions.

The special election provided for in this Section shall be conducted in accordance with law.

Section 9. If the proposition submitted to the electors as provided for in Section 8 of this Act is approved by the electors then:

(1) on and after March 1, 1980, the Tenth and Thirty-Ninth Judicial Districts shall be composed as is provided in Section 1 of this Act;

(2) the governor, within fifteen days after the date the results of the referendum provided for in Section 8 of this Act become official as provided in Section 575 of the Louisiana Code, shall call a special election for the purpose of electing a judge and a district attorney for the Thirty-Ninth Judicial District. The primary election shall be held on the first Saturday in January, 1980, and the general election shall be held on the sixth Saturday after the first Saturday in January, 1980. The elections herein provided for shall be conducted in accordance with law;

(3) the judge and district attorney elected at the special election herein provided for shall take office on March 1, 1980, and shall serve for terms which shall expire at the same time as the terms provided by law for judges of

district courts and for district attorneys throughout the state;

(4) the successors to the judge and district attorney elected at the special election provided for herein shall be elected at the same time and in the same manner as is provided by law for the election of district attorneys and judges of district courts throughout the state; and

(5) the judges and district attorney of the Tenth Judicial District who hold those offices on the effective date of this Act, shall continue to serve as judges and district attorney for that district until March 1, 1980. On and after March 1, 1980, the judges and district attorney of the Tenth Judicial District shall serve as judges and as district attorney for the Tenth Judicial District composed as is provided in Section 1 of this Act, until their terms expire and thereafter the judges and district attorney for the Tenth District shall be elected at the same time and in the same manner as is provided by law for the election of judges and district attorneys of district courts throughout the state.

Section 10. In the event more than one judicial district is established by authority of legislation passed at the 1979 Regular Session of the Louisiana Legislature, and two or more of such newly established districts are designated by the same number, the secretary of state is hereby authorized and directed to assign consecutive numbers to the newly established judicial districts, commencing with the Thirty-Eighth Judicial District, and to properly designate on the ballot provided for in Section 7 of this Act the number of the new districts created under the provisions of this Act.

* * * *

Section 12. The provisions of Sections 7, 8, 9, 10, 11, 12, 13, and 14 of this Act shall become effective upon signature by the governor or, if not signed or vetoed by the governor, upon expiration of the time for bills to be-

come law without signature by the governor, as provided by Article III, Section 18 of the Constitution. The provisions of Section 6 of this Act shall become effective on September 1, 1979, and the provisions of Sections 1, 2, 3, 4, and 5 of this Act shall become effective on March 1, 1980, if the proposition submitted to the electors as provided in Section 8 of this Act is approved by the electors. If the proposition is disapproved, the provisions of this Act shall expire and be null, void, and of no effect.

Section 13. For the purpose of transmission of this Act to the United States Department of Justice, as required by federal law, this Act shall become effective upon signature by the governor, or if not signed or vetoed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution.

Section 14. All laws or parts of laws in conflict herewith are hereby repealed, and R.S. 16:245 and R.S. 16:246 are hereby repealed in their entirety.

Section 15. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Approved by the Governor: July 18, 1979.

Published in the Official Journal of the State: August 13, 1979.

A true copy:

PAUL J. HARDY
Secretary of State.

[From Louisiana Session Laws, Special Session of 1981]

ACT No. 34

Senate Bill No. 22. By: Mr. Jumonville.

AN ACT

To amend and reenact Section 621.20 of the Louisiana Revised Statutes of 1950, relative to the number of judges for the Twentieth Judicial District; to provide for one additional judge; to provide for the qualifications, election, term, and compensation of the additional judge; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 621.20 of Title 13 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§ 621.20. Twentieth Judicial District

The Twentieth Judicial District shall have two judges.

Section 2. A. There is hereby created an additional office of district judge for the Twentieth Judicial District Court for the parishes of East Feliciana and West Feliciana.

B. For purposes of nomination and election only there are hereby created in the Twentieth Judicial District two administrative divisions, to be designated as Division A and Division B. The judge serving in the existing judgeship on the effective date of this Act and his successors in office shall preside over Division A. The first person to serve as judge of the newly created judgeship provided for in Subsection A of this Section and his successors in office shall preside over Division B.

C. The additional judge herein provided for shall be elected at large from the Twentieth Judicial District and shall have jurisdiction throughout the district and shall be elected by the qualified voters of the district.

D. The additional judge shall have the same qualifications and shall receive the same emoluments of office,

compensation and expense allowances, payable from the same sources and in the same manner, as are now or may hereafter be provided for the other judge of the district court.

E. The first judge to be elected to the additional judgeship shall be elected as provided by Article V, Section 22 of the Constitution. He shall take office on June 1, 1982 and shall serve for a term that shall expire at the same time as is provided by law for the other judge of the court. Thereafter, the successors to the additional judgeship provided for by this Act shall be elected at the same time and in the same manner and shall serve the same term as is now or may be hereinafter provided for other judges of the district.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provision, item, or application, and to this end the provisions of this Act are hereby declared severable.

Section 4. All laws or parts of laws in conflict herewith are hereby repealed.

Section 5. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

Approved by the Governor: November 19, 1981.

Published in the Official Journal of the State: December 15, 1981.

A true copy:

JAMES H. "Jim" BROWN
Secretary of State.

FILED
APR 4 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Appellants,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

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April 4th, 1991

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QUESTIONS PRESENTED

1. Did the three-judge court correctly conclude that preclearance of a specific number of positions in a Louisiana judicial district constitutes preclearance of each such position?

2. Did the three-judge court correctly conclude that certain other Louisiana judgeships have been precleared?

3. Can the Justice Department use Section 5 of the Voting Rights Act to refuse to preclear additional judgeships solely because of opposition to a pre-existing "system" of electing judges?

4. Did the three-judge court err in scheduling elections for certain unprecleared judgeships on November 6, 1990, and December 8, 1990?

5. Should judges elected to certain unprecleared positions be removed from office?

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STATEMENT OF THE CASE

A. The Judicial System in Louisiana

The Louisiana Constitution vests judicial power in the State of Louisiana in a Supreme Court, courts of appeal, district courts, and other courts authorized by the Louisiana Constitution. La. Const. art. 5, § 1. This appeal involves the courts of appeal and the district courts.

There are five circuit courts of appeal in Louisiana, each of which is divided into separate election districts. La. R.S. 13:312. The appellate jurisdiction for these courts extends to all civil matters, all family and juvenile court matters, and substantially all criminal matters, except capital cases. La. Const. art. 5, § 10.

There are forty district courts in the State of Louisiana, together with both a civil and criminal district court in the Parish of Orleans. La. R.S. 13:477, 13:1136, 13:1335. Each judicial district must be composed of at least one parish. La. Const. art. 5, § 14. Where the district contains more than one judge, the judges are elected at-large from the entire district. They are the primary courts of original jurisdiction for both civil and criminal matters, except in Orleans where these functions are separated. La. Const. art. 5, §§ 16(A), 32.

"Both prior to and subsequent to the Voting Rights Act of 1965, the district judges were elected on an at-large basis by district, while the judges on the courts of appeal were elected by circuit, on both a division and an at-large basis."[1] *Clark v. Roemer*, 751 F. Supp. 586, 588; Appendix

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[1] La. Const. art. 5, § 14 (district judges) & § 9 (courts of appeal). *See also* La. Const. of 1921, art. 7, § 31 (district judges); La. Const. of 1921, art. 7, §§ 20, 21; La. Const. of 1913, art. 100; La. Const. of 1898, art. 100; and La. Const. of 1879, art. 97 (courts of appeal). 751 F. Supp. at 588 n.5; J.S. App. 4a n.5.

to Jurisdictional Statement 4a [hereinafter "J.S. App. #"] (M.D.La. 1990) (three-judge court).[2] Many of these judgeships predate the Voting Rights Act of 1965.[3] The delegates to the Louisiana Constitutional Convention of 1973 "overwhelmingly voted to retain the concept of electing district judges on a district-wide, at-large basis and electing court of appeal judges by circuit." 751 F. Supp. at 588; J.S. App. 5a. The 1974 Louisiana Constitution was precleared by the Justice Department. *Chisom v. Edwards*, 690 F. Supp. 1524, 1525 & n.4 (E.D. La. 1988).

Louisiana, like the United States and the other states, has periodically needed additional judges to deal with an ever increasing caseload. *See Clark v. Edwards*, 725 F. Supp. 285, 294 (M.D. La. 1988). As judgeships were added, "the state, on most occasions, would seek preclearance of the newly enacted act from the Attorney General of the United States." 751 F. Supp. at 589, J.S. App. 7a. Preclearance requests for additional judgeships were made 81 times before 1988. 751 F. Supp. at 593 n.41, J.S. App. 29a n.41. *Every* preclearance request made before institution of this lawsuit was granted. *Id.* The

[2] This lengthy opinion of the three-judge court was rendered October 31, 1990, after submission of well over fifty pleadings and copious memoranda and after two hearings. This opinion is hereinafter cited by its page number in the Federal Supplement and in the Appendix to the Jurisdictional Statement.

[3] A list of such judgeships can be found in Appendix B to the three-judge court decision of October 31, 1990. 751 F. Supp. at 601.

State, however, failed to submit certain additional judgeships for preclearance.[4] The three-judge court found:

> Many of the judgeships which the state failed to preclear have been in existence for many years. In many instances the state sought and obtained preclearance of an additional position in a particular district in which preclearance had not been sought for an earlier position.

751 F. Supp. at 589, J.S. App. 7a-8a.

B. Procedural History of this Case

This appeal only involves questions under Section 5 of the Voting Rights Act. Because most of the litigation thus far has involved Section 2(b) of the Voting Rights Act, recapping the procedural history requires an initial discussion of the Section 2(b) claims.

1. The Voting Rights Act Section 2(b) Claims

Appellants brought this lawsuit in 1986 in the United States District Court for the Middle District of Louisiana as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consisted of all black voters in the State of Louisiana. The action challenged the at-large voting system for the election of district, family court and courts of appeal judges as being in violation of the 1965 Voting Rights Act, as amended, because, allegedly, the use of an at-large system results in

[4] Most of the unprecleared judgeships were created during the 1970s or even earlier. A chart showing the stipulated list of precleared and unprecleared judgeships appears in the Joint Appendix [hereinafter "J.A. #"] on pp. 214-21. Louisiana contends that certain other judgeships have been precleared and prepared substitute pages for that chart. *See* J.A. 236-38.

a denial or abridgment of the right to vote of appellants and all those similarly situated on account of race and color.

When this lawsuit was filed there were 48 courts of appeal judges in Louisiana. *Clark v. Edwards*, 725 F. Supp. 285, 288 (M.D. La. 1988). As of the same date, 156 judges were elected to serve in the judicial districts outside of Orleans Parish. *Id.* In Orleans Parish there were 10 criminal district court judges and 12 civil district court judges. *Id.*

On August 15, 1988, the district court held that the Louisiana at-large judicial election system violated Section 2 of the Voting Rights Act. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). The district court enjoined judicial elections which were scheduled for Fall, 1988. This injunction was overturned by the United States Court of Appeals for the Fifth Circuit. *Clark v. Roemer*, 88-3626 (5th Cir. Sept. 7 1988) (*per curiam*) (unreported). An Application for Stay to this Court was denied by Justice White. When the Application was resubmitted to Justice Marshall, he submitted it to the full Court, which once again denied the stay. *Clark v. Roemer*, 487 U.S. 1266 (1988).

In February 1990 the district court held a remedy trial, ultimately ordering sub-districting in nine district courts, the family court in East Baton Rouge Parish, and in a sub-district of one court of appeal. The district court reversed in part its August 1988 decision which had held that violations existed in fourteen additional judicial districts, and in several courts of appeal. *Clark v. Roemer*, Findings of Fact and Conclusions of Law – Remedy Stage (M.D. La. June 12, 1990) (unreported)[hereinafter "Remedy Opinion p. #"].

On September 28, 1990, the Fifth Circuit rendered its *en banc* decision in the case of *League of Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), *cert. granted*, ___ U.S. __, 112 L.Ed.2d 838 (1991)[*"LULAC"*], holding that Section 2(b) of the Voting Rights Act does not apply to the judiciary. The district court in this case then granted a Rule 54(b) motion filed by appellees, dismissing:

> plaintiffs' claim that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973."

Clark v. Roemer, Order (M.D. La. October 19, 1990) (unreported).

This decision was appealed by appellants to the Fifth Circuit and docketed under 90-3785. Appellants then filed a petition for a writ of certiorari, before judgment, to this Court. No. 90-898. The appeal and the petition are still pending.

2. The Voting Rights Act Section 5 Claims

The appellants also asserted in their Complaint and amendments thereto that certain Louisiana statutory provisions creating additional judgeships had not been precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act. Five judgeship elections were enjoined by a three-judge court on September 27, 1988. Thereafter, no action was taken by appellants regarding the Section 5 claims until July, 1990, four years after instituting this lawsuit. At that time they moved to submit the Section 5 claims to a three-judge court, which was

composed of Circuit Judge Davis, Chief Judge Parker[5], and Judge Polozola.

On September 28, 1990, the three-judge court entered an interim order permitting to occur the regularly scheduled primary elections on October 6, 1990, and the runoff on November 6, 1990, but enjoining the winning candidates from unprecleared districts from taking office. J.S. App. 90a. Qualifying for some of those positions had begun before a hearing was requested to enjoin those elections. 751 F. Supp. at 594; J.S. App. 32a. Appellants did not appeal the refusal to enjoin the election.

That same day, September 28, 1990, the Fifth Circuit issued its *en banc* decision in *LULAC*. Based on the *LULAC* decision, on October 2, 1990, Judge Parker ordered that elections which he had earlier enjoined under the Section 2 portion of this lawsuit should go forward. *Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990). The three-judge court in a separate order issued on October 2, 1990, allowed certain other elections to take place on the same schedule as set forth in its September 28, 1990, opinion, again with the winners being forbidden from taking office. J.S. App. 85a. Appellants did not appeal the refusal to enjoin the election.

On October 18, 1990, the three-judge court held another hearing concerning the 1990 judicial elections. On October 22, 1990, the court issued an order allowing the elections to go forward. 751 F. Supp. 586, 598, J.S. App. 68a. By that time well over fifty pleadings and copious memoranda had been submitted to the three-judge court.

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[5] Judge Parker has presided over the district court proceeding during the entire history of this case, including two lengthy trials.

On October 31, 1990, the court issued a lengthy opinion explaining its order. 751 F. Supp. 586; J.S. App. 1a.

The order and opinion addressed elections to be held under four different categories of statutes. First, elections for judgeships previously precleared or which did not require preclearance would take place. 751 F. Supp. at 590, J.S. App. 12a-13a. Second, the three-judge court held that a number of statutes creating judicial positions had been precleared, ruling "that when 'the Attorney General cleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in the district.' " 751 F. Supp. at 590, J.S. App. 13a. Third, elections would proceed for certain other judgeships which had not been precleared but for which the three-judge court had allowed qualifying and campaigning. 751 F. Supp. at 590-91, J.S. App. 14a-15a. Judges elected to these positions would serve provisionally pending further orders of the court. Finally, the three-judge court enjoined certain other elections where the court had not permitted qualifying to reopen since the qualification had originally occurred more than two years before. 751 F. Supp. at 591 n.24, J.S. App. 17a n.24. The three-judge court held that within ninety days the State of Louisiana must either obtain preclearance of the unprecleared judgeships or file a declaratory action with the United States District Court for the District of Columbia under the provisions of 42 U.S.C. § 1973c, failing which the judges provisionally

elected would be automatically removed from office. 751 F. Supp. at 590-91, J.S. App. 16a-17a.[6]

On October 29, 1990, appellants filed an application for injunction pending appeal to this Court. On November 2, 1990, this Court enjoined the elections which the three-judge court held had not been precleared. *Clark v. Roemer*, ___ U.S. ___, 112 L.Ed.2d 390 (1990), *modified*, ___ U.S. ___, 112 L.Ed.2d 391 (1990). The injunction was conditioned upon the timely filing of a jurisdictional statement in this Court. This Court refused to overturn the three-judge court's order holding that certain additional judgeships had been precleared because of the preclearance of subsequent statutes which once again increased the number of judges in the applicable judicial districts. This Court also refused to remove the judges who were either elected on October 6, 1990, or who had not drawn opposition for the October 6, 1990 election. This appeal followed, and probable jurisdiction was noted by this Court on January 18, 1991. ___ U.S. ___, 112 L.Ed.2d 838 (1991).

SUMMARY OF ARGUMENT

1. The three-judge court correctly concluded that preclearance of a specific number of positions in a Louisiana judicial district constitutes preclearance of each of those judicial positions. The three-judge court correctly

[6] Louisiana has filed such a declaratory action. The appellants commented in their brief that this action was filed on the next to last day of the applicable period. The United States did not file an answer until the very last day of the sixty day period allowed for such an answer.

analyzed Louisiana's preclearance submissions and the Justice Department's responses. This case is distinguishable from *McCain v. Lybrand*, 465 U.S. 236 (1984), in which this Court held that preclearance of additional council members and of redrawn residency districts for Edgefield County did not constitute preclearance of earlier, dramatic changes in the form of government for the County, including a change to an at-large system of government. The three-judge court also correctly concluded that certain other acts affecting Louisiana courts of appeal districts and judicial districts have been precleared.

2. The Justice Department cannot refuse to preclear additional judgeships in Louisiana because it dislikes Louisiana's "system" of electing judges, a "system" which predates the Voting Rights Act of 1965. The record is devoid of any evidence that Louisiana adopted this election "system" for discriminatory purposes. The Justice Department takes the radical position that Louisiana must change its system of electing judges to a system composed of "neighborhood judges" or a system in which voters do not have the right to vote for each judgeship to be elected in the judicial district. Either such system is highly undesirable and repugnant. Moreover, changing the method of electing the unprecleared judicial positions will not alter the existing Louisiana judicial election "system"; instead, some judges would be elected under the existing system and some under the new system, thereby thoroughly confusing the electorate. The Department's refusal to preclear these additional judgeships ignores decisions by this Court, by the Fifth Circuit, and by the district court in this case. The Department is also violating its regulations by failing to approve these additional judgeships.

3. The three-judge court's decision that elections for certain unprecleared judgeships should take place on November 6, 1990, and December 8, 1990, is now moot. Nevertheless, the three-judge court correctly weighed the interests of all involved and reached an appropriate remedy in allowing the elections to take place and the winners to serve provisionally.

4. Judges elected during 1990 to unprecleared judicial positions should not be removed from office. These elected judges should continue to serve provisionally until a decision is reached in Louisiana's preclearance action in the district court in the District of Columbia.

ARGUMENT

I. THE THREE-JUDGE COURT CORRECTLY CONCLUDED THAT CERTAIN JUDGESHIPS HAVE BEEN PRECLEARED.

A. Preclearance of a Specific Number of Positions in a Louisiana Judicial District Constitutes Preclearance of Each of Those Positions.

As Louisiana has needed additional judgeships since 1965, in most instances the State sought preclearance of such judgeships. 751 F. Supp. at 589, J.S. App. 7a. The Justice Department routinely precleared such additional judgeships every time a request was made, totalling 81 times prior to this lawsuit. 751 F. Supp. at 593 n.41; J.S. App. 29a n.41. Louisiana, however, failed to submit some additional judgeships for preclearance, most of which judgeships were created during the 1970s or even earlier. 751 F. Supp. at 589, J.S. App. 7a-8a, J.A. 214-21.

In 1988 the Justice Department suddenly did an "about-face" and refused to preclear additional judgeships. The Justice Department stated that it was not opposed to adding judgeships but that it was opposed to the pre-existing Louisiana "system" of electing judges.[7] The Justice Department wants to replace this "system" with a system of neighborhood judges or a system in which voters can vote for only a limited number of the judicial positions on a ballot.[8]

In most of the judicial districts where the Justice Department refused to preclear a judgeship, the Justice Department had precleared one or more of the judgeships created after creation of the unprecleared judgeship. After reviewing the evidence adduced by the parties, the three-judge court concluded:

> [W]hen the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district.

751 F. Supp. at 592, J.S. App. 23a-24a. The appellants contend that this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984), mandates reversal of this holding.

McCain is easily distinguishable from this case. *McCain* involved changes in the form of government in Edgefield County, South Carolina. Until 1966, Edgefield County was governed by a three member Board of County Commissioners. The chairman, known as the County Supervisor, was elected at large. The other two

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[7] *See* pages 28-30 *infra*.

[8] Problems with such systems are discussed on pages 37-41 *infra*.

members were appointed by the Governor of South Carolina, upon recommendation of a majority of the county's legislative delegation after a county-wide straw vote on prospective appointees. There were no residency requirements for the Commissioners. All three Commissioners served four year terms.

In 1966 South Carolina "created a new form of government for Edgefield County," *id.* at 239, abolishing the County Supervisor and the Board of County Commissioners. Members of the new three member County Council were to be elected at large throughout the county, although each had to reside in a separate residency district. Members served for two year terms, and the three members annually elected a chairman. This act was not precleared. *Id.* at 238.

In 1971 South Carolina made further changes in the Edgefield County government, increasing the number of residency districts and thus the number of council members from three to five. As this Court noted, "[n]ecessarily the change in the number of districts resulted in new district boundaries." *Id.* at 240. Preclearance of this 1971 act was sought and received. *Id.* at 241.

Thereafter, minority voters in Edgefield County filed a class action suit alleging constitutional violations, later amending the action to contend that the 1966 act was never precleared. Ultimately, this Court held that preclearance of the 1971 act did not constitute preclearance of the 1966 act. The 1971 act involved "an increase in the number of Council members and residency districts." *Id.* at 251. The unprecleared 1966 act, however, totally rewrote the form of government for Edgefield County, providing for at-large election of all members of the

governing body, devising residency districts, and shortening the term of office. In approving the 1971 change, the Attorney General was focusing on the change in boundaries and number of seats, not on the dramatic change to an at-large system made by the 1966 act. *Id.* at 252.

Analysis of the briefs in *McCain* shows that the issue before the Court was whether approval of the increased number of districts in 1971 constituted preclearance of the change to an at-large system in 1966. The Questions Presented section of the Jurisdictional Statement in *McCain* included:

> 2. Whether pre-clearance under § 5 of a 1971 submission expressly limited to an increase in size of the Council from three to five members, resulted in preclearance *sub silentio* of at-large elections adopted in 1966, where the submission contained no information to enable the Attorney General to determine whether the 1966 use of at-large voting was a change from any prior practice . . .

p. i. A similar question was stated in the *McCain* Appellants' Brief on the Merits. *See* pp. i-ii. Moreover, the United States in *McCain* included as a question:

> 1. Whether the Attorney General can be deemed to have granted preclearance pursuant to Section 5 of the Voting Rights Act to the use of at-large elections for selecting Edgefield County Council members by his failure to object to a 1971 Act that purported only to increase the size of the county council and that was submitted for review without any indication that the county wished preclearance for the use of at-large elections or that at-large elections were a change in voting practices that had never received preclearance.

p. i.

While in *McCain* the unprecleared act created a completely new method of electing the county government, here almost all of the unprecleared acts merely provided for an additional judgeship in various districts[9] and stated that the total number of judgeships would be the increased number.[10] A subsequent statute (which was precleared) once again added a judgeship and stated that the total number would be the new increased number. An example of this situation is Caddo Parish, the First Judicial District:

Division	Added	Preclearance Requested[11]	Granted[12]	Denied[13]
A		N/A		
B		N/A		
C		N/A		
D		N/A		
E	Acts 1966, No. 2	YES	8/18/86	
F	Acts 1973, No. 117	YES		9/23/88
G	Acts 1976, No. 46	YES	8/11/76	
H	Acts 1978, No. 39	YES	9/20/78	
I	Acts 1982, No. 21	YES	12/2/82	

[9] The appellants concede in their brief that "[m]ost" of the judgeships which the three-judge court held to be precleared fit in this category. p. 7.

[10] The history of Louisiana's "method" of electing judges is described in footnote 25 on page 27 *infra*.

[11] Acts 1956, Ex. Sess. No. 7, § 1, amended former R.S. 13:621 to provide that the First Judicial District should have four judges. This Act predated the 1965 Voting Rights Act.

The three-judge court deemed it nonsensical that adding Judge No. 5 (Division "E") to the first four judges was permissible, and that adding Judges No. 7, No. 8, and No. 9 (Divisions "G, H, and I", respectively) to the existing judgeships were each permissible, but that somehow adding Judge 6 (Division "F") to Judges 1, 2, 3, 4 and 5 was objectionable. The three-judge court held as follows concerning the submissions for the First Judicial District:

> We find that when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district. . . . We reach this conclusion because each of the Acts of the legislature which added a new division in Caddo Parish provided that the Act increased the number of judges in the district from an existing number to a new number. When the Attorney General precleared seven judicial positions in Caddo Parish at the time Division G was added, he thereby expressly approved the first six positions, which included Division F. Contrary to plaintiffs' argument, we find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990, order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance,

[12] All but one of the applicable preclearance letters by the U.S. Department of Justice are reproduced in the Joint Appendix. *See* J.A. 210, 208, 200. The preclearance letter for Acts 1976, No. 46, is reproduced beginning on App. 3 of the Motion to Dismiss or Affirm filed by the State of Louisiana in this Court on January 14, 1991.

[13] This letter is reproduced beginning at J.S. App. 108a.

support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

In determining whether the preclearance sought by the State of Louisiana was proper within the meaning of Section 5 of the Voting Rights Act of 1965, the Court must determine whether the submission was in an "unambiguous and recordable manner" and whether the submission was "in fact evaluated" by the Attorney General. The Court finds that the evidence presented in this case does show that the submissions were made to the Attorney General in an unambiguous manner, and he approved the various increases in the number of judges to be added to each of the districts set forth in Part I of our October 22 order.

751 F. Supp. at 592, J.S. App. 23a-29a.[14]

The inconsistencies in the approach by the Justice Department were not limited to the First Judicial District. Other examples drawn from the chart on J.A. 214-21 include:

> Sixteenth Judicial District – After approving and preclearing judgeships for Divisions "E" and "F", created in 1977 and 1981, the Justice Department objected in 1988 to a judgeship created for Division "D" 20 years earlier.
>
> Twenty-First Judicial District – After approving and preclearing a judgeship for Division "E" created in 1977, the Justice Department objected in 1988 to a judgeship created for Division "D" 14 years earlier.
>
> Twenty-Third Judicial District – After approving and preclearing a judgeship for Division "D" created in 1982, the Justice Department objected in 1988 to a judgeship created for Division "C" 20 years earlier.
>
> Twenty-Seventh Judicial District – After approving and preclearing a judgeship for Division "D" created in 1982, the Justice Department objected in 1988 to a judgeship created for Division "C" 17 years earlier.
>
> Twenty-Ninth Judicial District – After approving and preclearing judgeships for Divisions "D" and "E" created in 1978 and 1981, the Justice Department objected in 1988 to a judgeship created for Division "C" 18 years earlier.

After considering these and many other anomalies, and after reviewing the Louisiana statutes and the submission letters, the three-judge court concluded that all of these seats had been precleared, stating:

> The example which the Court used in our opinion involved Caddo Parish. The same reasoning was used for each of the parishes in which the Court found preclearance by the Attorney General when he approved a subsequent act in a particular district.

751 F. Supp. at 593 n.39, J.S. App. 27a n.39.[15] Such a conclusion is logical and in keeping with the purpose of

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[14] The three-judge court called Louisiana's submissions:

> clearly distinct and different from the facts set forth in *McCain v. Lybrand*, which is relied on by the plaintiff. It cannot be said that the submission by the State of Louisiana was ambiguous concerning the scope of the request.

751 F. Supp. at 592 n.38, J.S. App. 26a n.38 (citations omitted).

[15] To enact a new statute in Louisiana, the legislature must repeal the old statute and then amend and reenact it. "A bill

(Continued on following page)

Section 5, which is to prevent discriminatory changes and allow nondiscriminatory changes.[16]

Significantly, the Justice Department approved *every* additional judgeship sought on the 81 occasions that Louisiana made preclearance requests concerning additional judgeships. 751 F. Supp. at 593, n.41, J.S. App. 29a n.41. Approval of such acts continued during the pendency of

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enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of law shall be adopted by general reference to it." La. Const. art. 3, § 15(b). Louisiana courts have held that when the legislature amends a law it cannot simply amend the existing statute; instead, the legislature must amend it and reenact the law *in toto*. *See, e.g., State v. Boylston*, 69 So. 860 (1915).

[16] The logic of the three-judge court's approach is demonstrated by the absurdity of the alternative. Two judgeships in the Twenty-Third Judicial District predated the Voting Rights Act of 1965. Preclearance of Judgeship "C", added by Acts 1968, No. 464, was rejected in 1988. J.S. App. 108a. Judgeship "D" was added by Acts 1982, No. 21, and was promptly precleared. *See* J.A. 218. Under the Justice Department's theory, there could not be four judges in that judicial district because the third judge was not precleared. Additionally, arguably there could not be three judges because the Justice Department refused to preclear having three judges. Thus, there could only be two judges, one-half the number the Twenty-Third Judicial District needs. Indeed, arguably there cannot be *any* judges in the Twenty-Third Judicial District. Having only two judges would be a change from what was precleared in 1982, which change would itself require preclearance. Given that the Justice Department has refused for the past two years to preclear almost every additional judgeship in Louisiana, presumably the Justice Department would not preclear having one or two judges in that district.

this litigation until Judge Parker rendered his initial decision that Louisiana's method of electing judges violated Section 2 of the Voting Rights Act.[17] *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). Thereafter, the Justice Department suddenly reversed its attitude and policies, and, in doing so, refused to preclear new acts creating additional judgeships and refused to preclear acts passed as long as twenty years ago creating additional judgeships. In its October 31, 1990 Opinion, the three-judge court stated:

> The evidence submitted by the parties indicates that the Attorney General approved the method Louisiana used for adding judges approximately 81 times. Preclearance was denied on only three dates: September 23, 1988; May 12, 1989; and September 17, 1990. These denials came after Judge Parker had rendered his decision in the Section 2 case on August 15, 1988.

751 F. Supp. at 593 n.41, J.S. App. 29a n.41.

The appellants also contend that the three-judge court's action is contrary to the decision of the three-judge court in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem. Martin v. Haith*, 477 U.S. 901 (1986). In *Haith*, however, the unprecleared acts involved substantive changes in the method of electing judges, not simply an addition to the number of judges. The first unprecleared statute, Session Law Chapter 262 of 1965, established a system of numbered posts for superior court judges. 618 F. Supp. at 411-12. The second unprecleared statute, Session Law Chapter 997 of 1967, provided for additional judges who would serve terms

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[17] *See, e.g.*, Justice Department Letter, August 18, 1986, J.A. 210.

staggered from the positions already in existence in those districts. *Id.* at 412.[18]

Once again, the Louisiana acts that were not precleared did not change the majority vote, designated post, at-large system of electing judges in Louisiana. These acts merely increased the number of judges to be elected in a judicial district. Surely if having seven judges does not violate Section 5 of the Voting Rights Act, having six judges does not do so either.[19]

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[18] Further, a summary affirmance such as occurred in *Haith* is "not of the same precedential value as would be an opinion of the Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *accord*, *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

[19] The appellants make the following specious argument: Allowing preclearance of the total number of judgeships to constitute preclearance of each of those judgeships will encourage jurisdictions to add judgeships for discriminatory reasons and fail to preclear them in the hope that "someday in the future" the jurisdiction will add another judgeship for non-discriminatory reasons, which will be precleared and will thus cure the previous, unprecleared judgeship. There is absolutely no evidence in the record that Louisiana added any judgeship for any discriminatory reason. Instead, Louisiana added a judgeship because Louisiana needed another judge. The three-judge court found that all parties conceded these facts. 751 F. Supp. at 595 n.50, J.S. App. 37a n.50. If a jurisdiction does add a judgeship for a discriminatory reason and that judgeship is precleared (initially or at some later time), a claim can be brought under Section 2(a) of the Voting Rights Act contending that there was purposeful discrimination. *See* 42 U.S.C. § 1973(a). Such a claim would lie even if the Supreme Court affirms the Fifth Circuit's decision in *LULAC* that the "results test" set forth in Section 2(b) is inapplicable to the judiciary. *See* 914 F.2d 620 (5th Cir. 1990) (*en banc*).

B. The Three-Judge Court Correctly Concluded That Certain Other Acts Have Been Precleared

There were four other situations concerning which the three-judge court held that judgeships have been precleared. Two situations involved appellate judgeships and two involved district judgeships. These will be addressed in turn.

1. Appellate Judgeships

The appellants contend that the division of the First Circuit into districts has not been precleared. The three-judge court found, however, "that when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits." 751 F. Supp. at 598, J.S. App. 52a. Louisiana's preclearance request for Acts 1981, No. 3, of the Louisiana Legislature is in the Joint Appendix. *See* J.A. 155-99. Section 3 of the Act stated that "there shall be separate and distinct divisions within each district of the various courts of appeal." J.A. 174. Section 6 provided that the First Circuit would have twelve judges and that "[f]our judges shall be elected from each of the three districts composing the circuit by the qualified electors of each district, respectively." J.A. 181. Section 7(a) stated that "There shall be four court of appeals districts, which shall each be divided into districts as follows." J.A. 184.[20] The

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[20] The concept of divisions within the First Circuit, and the determination of which parishes are in each division, dates back to Acts 1958, No. 561, which, once approved by the electorate, amended Article 7, § 20 of the Louisiana Constitution of 1921. With the enactment of the 1974 Louisiana Constitution, this provision, like many others, was taken out of the Constitution and put into a statute. *See* La. Const. art. 14, § 16(A)(5).

three-judge court correctly concluded that the division of the First Circuit, like the division of each of the other circuits, has been precleared.

The appellants also object to two at-large judgeships, one in the Second Circuit and one in the Third Circuit. Once again, as the three-judge court found, preclearance of Acts 1981, No. 3, constituted approval of these at-large judgeships. 751 F. Supp. at 598, J.S. App. 52a. Section 8 of the Act provided that in the Second Circuit "[o]ne judge shall be elected from the circuit at large by the qualified electors thereof." J.A. 189. Further, a chart submitted to the Justice Department as part of the State's letter of August 26, 1981, refers to the existence of the at-large seats in the Third Circuit. J.A. 159.

2. Judicial Districts

The other two situations involved judicial districts. First, the appellants complain that the division of the Tenth Judicial District into the Tenth and Thirty-Ninth Judicial Districts was not precleared. Acts 1979, No. 635, created a new judicial district and provided for a special election for approval of this change by the voters in the former Tenth Judicial District. The Attorney General approved the special referendum election, the *sole* purpose of which was to divide the district into the two contemplated districts. J.A. 101. The referendum asked whether the voters were "FOR" or "AGAINST":

> the proposition that the Tenth Judicial District be divided, effective March 1, 1980, by the establishment of the Thirty-Ninth Judicial District composed of Red River Parish, and continuing the Tenth Judicial District composed on Natchitoches Parish as provided by . . . the 1979 Regular Session of the Louisiana Legislature.

Acts 1979, No. 635, § 8. Upon approval by the voters, the judicial district would automatically be split with Red River Parish comprising one judicial district and Natchitoches Parish the other. Acts 1979, No. 635, § 9.[21] The three-judge court correctly ruled that this approval constituted preclearance of the two districts. 751 F. Supp. at 598, J.S. App. 52a. Certainly, it would be illogical to preclear having a special election to approve dividing a judicial district into two parts if the division itself was objectionable.

The appellants contend that *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978), held that approval of a referendum does not constitute approval of the change sought to be brought about by the referendum. The situation in *Sheffield* was very different from that presented here. In *Sheffield* the city sought preclearance of a referendum to determine whether the commission form of government should be abandoned for a mayor/alderman form of government. *Id.* at 114. The Attorney General responded two months later (after the referendum was held), stating that he had no objection to a referendum but that preclearance would be necessary for the change to a mayor/council form of government. Further, he needed information concerning the type of aldermanic form of government as it existed in 1912, the number of aldermen to be elected, the terms and qualifications for the mayor and aldermen, whether the aldermen were to be elected at large or by wards, whether

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[21] No one has been able to find the letter requesting preclearance, although the letter granting preclearance begins on J.A. 101. Given that the same act provides for the referendum and for the actual splitting of the judicial district, presumably the act was sent to the Justice Department. Otherwise, the Justice Department would no doubt have asked for a copy.

there were numbered post, residency, majority vote or staggered term requirements, and whether single shot voting was prohibited. *Id.* at 115. When Sheffield explained its changes, the Attorney General objected to election of the city councilmen at-large. *Id.* at 116. A three-judge court held, *inter alia*, that preclearance of the referendum constituted preclearance of the governmental change. *Id.* at 116. This Court reversed, noting that Sheffield did not and could not have sought preclearance of the change in form of government when it submitted the referendum because "the details of the change had not yet been worked out." *Id.* at 137. Further, the Attorney General wrote back and stated that, although he had no objection to the referendum, he did need additional information to preclear the governmental change. *Id.*

While the referendum in *Sheffield* was for a complicated change in the form of government which would necessitate substantive decisions as to structure of the government, here the sole purpose of the referendum was to split a judicial district composed of two parishes into two judicial districts each of which would have one parish, with one judge to be elected in each. The nature and specifics of the change were thus set forth in the referendum, and preclearance of that referendum (without questions by the Justice Department concerning the nature of the change as occurred in *Sheffield*) constituted preclearance of the split in judicial districts.

Finally, the appellants state that the Attorney General did not approve the addition of a judge in the Twentieth Judicial District. The State asked for preclearance of a referendum to be held in that judicial district and asked for approval of a new judge. J.A. 123. The Attorney General approved the additional judgeship. Accordingly,

the three-judge court determined "that the split of District 20 into two parishes and the creation of District B was expressly submitted and approved by the Attorney General. 751 F. Supp. at 598, J.S. App. 53a.

II. THE JUSTICE DEPARTMENT CANNOT USE SECTION 5 OF THE VOTING RIGHTS ACT TO FORCE A CHANGE IN THE LOUISIANA "SYSTEM" OF ELECTING JUDGES WHICH PREDATES THE ACT.

Section 5 of the Voting Rights Act is possibly the most extreme intrusion into state authority (or rather into the authority of certain states) of any statute enacted by Congress. This Court has described Section 5 as "certainly the most extraordinary" remedial provision of the Voting Rights Act, *McCain v. Lybrand*, 465 U.S. 236, 244 (1984), and "an uncommon exercise of Congressional power." *Briscoe v. Bell*, 432 U.S. 404, 414 (1977), *quoting South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).[22] Section 5 reflects a "radical departure from traditional notions of constitutional federalism, a departure several Members of this Court have regarded as unconstitutional." *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 48 (1978) (Powell, Burger, & Rehnquist, JJ., dissenting).[23]

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[22] Chief Justice Rehnquist has spoken of "the unreasonably burdensome and unrealistic control which the Federal Government routinely exercises over state and local governments under the Voting Rights Act." *Blanding v. Dubose*, 454 U.S. 393, 401 (1982) (Rehnquist and Powell, JJ., concurring).

[23] Opinions expressing doubts as to the constitutionality of § 5 include *South Carolina v. Katzenbach*, 383 U.S. 301, 356-62 (1966) (Black, J., concurring and dissenting), *Allen v. Board of*

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Because § 5 is so intrusive, it should be read and interpreted with care. Justice Stevens has noted that

> [e]ven the Department of Justice has described [§ 5] as a "substantial departure . . . from ordinary concepts of our federal system;" its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care.

United States v. Board of Commissioners of Sheffield, 435 U.S. 110, 140 (1978) (Stevens, Burger, and Rehnquist, JJ., dissenting).

Such a careful reading and interpretation shows that Congress intended by enacting Section 5 of the Voting Rights Act to "freez[e] the election laws of the covered States unless a declaratory judgment is obtained in the District of Columbia holding that a proposed change is without discriminatory purpose or effect." *Georgia v. United States*, 411 U.S. 526, 538 (1973). "Congress adopted § 5 which provides that whenever a designated State or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 121 (1978).[24] "[D]iscriminatory practices . . . instituted prior

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Elections, 393 U.S. 544, 586 n.4 (1969) (Harlan, J., concurring and dissenting); *City of Rome v. United States*, 446 U.S. 156, 193 (1980) (Powell, J., dissenting).

[24] Similarly, Justice Brennan has stated that "Section 5, of course, was intended to prevent [certain] States . . . from . . . continually contriving *new* laws to deprive blacks of any newly won voting rights." *Berry v. Doles*, 438 U.S. 190, 195 (1978) (Brennan and Marshall, JJ., concurring) (emphasis supplied).

to November 1964 . . . are not subject to the requirement of preclearance [under § 5]." *Beer v. United States*, 425 U.S. 130, 138 (1976), *quoting* U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After*, 347.

In this case, however, the Justice Department is attempting to impermissibly rewrite Section 5 to attack Louisiana's long-standing practice of electing judges at-large. There is no real contention by the Justice Department that there is anything wrong with having a fifth judge in a judicial district, or that Louisiana had some nefarious motive in proposing such a fifth judge. Instead, the Justice Department wants Louisiana to scrap the at-large system of electing the judiciary in favor of some other method of electing judges such as sub-districts, limited voting, or cumulative voting. In essence, the Justice Department is attempting to "unfreeze" the method of electing judges in Louisiana.

The three-judge court found that Louisiana had been electing district judges on an at-large basis and circuit court judges on both a division and an at-large basis "[b]oth prior to and subsequent to the Voting Rights Act of 1965." 751 F. Supp. at 588, J.S. App. 4a.[25] After having

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[25] Louisiana's at-large system of electing judges has been in effect since 1946, *see* LA. R.S. 13:582-585, thus predating by two decades the Voting Rights Act of 1965. 42 U.S.C. § 1973. Delegates to the Louisiana Constitutional Convention held in 1973 "overwhelmingly voted to retain the concept of electing district judges on a district-wide, at-large basis and electing court of appeal judges by circuit." 751 F. Supp. at 588, J.S. App. 5a. The 1974 Louisiana Constitution was precleared by the Justice Department. *Chisom v. Edwards*, 690 F. Supp. 1524, 1525 & n.4 (E.D. La. 1988). Further, the Louisiana Election Code, Acts 1976, No. 697; La. R.S. 40: 401 *et seq.*, which provides for a majority vote requirement, La. R.S. 40:511, 512, was also precleared on October 19, 1976.

granted preclearance "approximately 81 times," the Justice Department abruptly shifted position and refused to preclear new judgeships after Judge Parker rendered his initial decision in this case that Louisiana's method of electing judges violated Section 2 of the Voting Rights Act. 751 F. Supp. at 593 n.41, J.S. App. 29a n.41; *see Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988).

Thereafter, the Justice Department suddenly refused to preclear new judgeships. 751 F. Supp. at 593 n.41, J.S. App. 29a n.41. The first letter evidencing this change in position was written on September 23, 1988. J.S. App. 108a. *Nothing* in that letter focused on the motive of the Louisiana Legislature in adding the judgeships for which preclearance was sought. Instead, the Department refused approval because Louisiana was "seeking to add elective judgeship positions under an election system that has been found to violate Section 2 of the Voting Rights Act." J.S. App. 111a.

A subsequent Justice Department letter, dated May 12, 1989, also refused to preclear several additional judgeships. J.S. App. 127a. Once again, the Department did not base its objections on any problems with the submitted acts. Indeed, the letter precleared the portion of Acts 1985, No. 56, which added a district judge in the Twelfth Judicial District, but refused preclearance of other portions of the same act which provided for several other additional judgeships and the splitting of two judicial districts. Rather than examining the proposed changes, the Department refused preclearance because of the existence of Louisiana's "at-large system with designated posts and a majority vote requirement." J.S. App. 132a. That "system," however, was not changed in any way by the submitted act.

The third refusal to preclear additional seats occurred on September 17, 1990. On that date the Justice Department issued two letters. One letter precleared additional judgeships in Orleans Parish. J.S. App. 136a. The Department stated that "the changes do not have the purpose and will not have the effect of discriminating on the basis of race or color and that implementation of the changes will not lead to a clear violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973." J.S. App. 139a. Strangely enough, the same acts precleared by this letter had earlier been denied preclearance in the September 23, 1988, and May 12, 1989, letters discussed above. J.S. App. 125a, 127a.

In a separate letter also dated September 17, 1990, the Justice Department refused to change its position concerning the previous additional judgeships sought to be precleared and refused to approve other additional judgeships. J.S. App. 142a. The Department refused to permit certain additional judgeships sought by Act 8 of 1990, although another letter dated the same day did preclear other judgeships added by that same legislation. *Compare* J.S. App. 142a, 160a, 166a *with* J.S. App. 136a. In this letter the Department made quite clear that its objections were not based on any suspicion of invidious motive of Louisiana in adding the judgeships; indeed, it stated that "we do not in any way question the State's need for or purpose in creating new judgeship positions." J.S. App. 159a.[26] Instead, the Department focused its

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[26] As the three-judge court found,

> All parties to this litigation concede that the legislature added positions to the various district courts and the courts of appeal because the caseload required such. There are no allegations that the

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disapproval on Louisiana's "system" of electing judges, contending that "the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the *Clark* court has given the State ample opportunity to do so." J.S. App. 153a. Thus, because Louisiana chose to exercise its legal right to litigate alleged Section 2 violations in parts of Louisiana, the Justice Department decided to prevent Louisiana from adding much needed judgeships.[27]

The cited letters provide indisputable evidence that the Justice Department is focusing not on *changes* in Louisiana's statutes, but on opposition to long-standing

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> additional judges were added in a racially discriminatory manner. It is the concept of electing judges on an at-large basis that is the subject of the discrimination charge in this case.

751 F. Supp. at 595 n.50, J.S. App. 37a n.50.

[27] Louisiana's decision to contest this lawsuit was certainly well-founded. In his initial decision on liability, Judge Parker found that the three factors set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), could be met only in some of the judicial districts and court of appeals districts in Louisiana. *See Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). After the remedy trial, Judge Parker reversed himself in part and held that the plaintiffs had not proven violations after all in fourteen judicial districts concerning which he had initially found violations. Moreover, he determined that there was a violation in only one district of one court of appeal. *Clark v. Roemer*, Remedy Opinion. Ultimately, after the Fifth Circuit's decision in *LULAC*, Judge Parker dismissed the entire Section 2(b) claim. *Clark v. Roemer*, Order October 19, 1990 (M.D.La.) (unreported). That decision has been appealed to the United States Court of Appeals for the Fifth Circuit, Docket No. 90-3785, and certiorari has been sought in this Court, No. 90-898.

Louisiana practices that predate the Voting Rights Act.[28] Further evidence is provided by the Justice Department's conduct regarding the Sixth Judicial District. In its September 17, 1990, letter, the Justice Department refused to preclear an additional judgeship for that judicial district. J.S. App. 163a. The election for that judgeship took place on October 6, 1990, pursuant to the three-judge court order, and a black won. Thereafter, on November 20, 1990, the Justice Department precleared the previously unapprovable seat even though *no* request for preclearance of that seat was pending. J.S. App. 184a.

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[28] Indeed, the Justice Department, in distinguishing Louisiana's statutory scheme for the election of judges from that of Mississippi, has previously conceded in a sworn interrogatory answer that the allegedly objectionable aspects of the Louisiana statutes at issue here (*i.e.*, the use of at-large elections, a majority-vote requirement, and designated divisions) do not constitute "changes" for purposes of Section 5:

> On several occasions the Attorney General has precleared Louisiana statutes which added judges to existing districts and provided that these judges would be elected at large, districtwide. Although these statutes denominate numbered posts for each such judge, a statute of general application antedating the Voting Rights Act required that each such judge be elected by a numbered post so that such designation of positions was not a change subject to the Section 5 preclearance requirement.

United States Response to State of Mississippi's First Set of Interrogatories to Defendant, *State of Mississippi v. United States*, C.A. No. 87-3464 (D.D.C. filed April 8, 1988), at pp. 15-16 (reproduced herein at App. 2-3). Judicial notice can be taken of such an answer. *See, e.g., Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977); *Mobil Oil Corp. v. Tennessee Valley Authority*, 387 F. Supp. 498, 515 n.41 (N.D. Ala. 1974).

Although the initial decision in *Clark* apparently gave the Justice Department impetus to refuse to approve Louisiana statutes adding judgeships, the Department continued to refuse preclearance after the Fifth Circuit's *en banc* decision in *LULAC* and after Judge Parker's dismissal of the § 2 claims in this case. This refusal constitutes a blatant misuse of § 5, which nowhere gives the Justice Department the right to prevent implementation of statutes because it does not like a system in place before the Voting Rights Act of 1965. Further, the Justice Department's opposition to the Louisiana election "system" ignores the decision in this case that the Louisiana "system" of electing judges cannot violate Section 2, *Clark v. Roemer,* Remedy Opinion p. 3, and ignores the Fifth Circuit's decision in *LULAC*.[29]

By insisting that Louisiana change its "system" of electing judges if it is to have additional judges, the Justice Department also is ignoring this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986), that any remedy under Section 2 must be district-specific and not systemic. In holding that a "systemic" remedy is appropriate, the Justice Department cited as authority Judge Parker's statement in his opinion on liability in this case that the solution was to

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[29] In a letter dated November 20, 1990, the Justice Department refused to reconsider its opposition to the Louisiana "system" of electing judges despite the *LULAC* decision "that the Section 2 results standard does not apply to judicial election systems." J.S. App. 180a. In refusing to change its position, the Justice Department noted that *LULAC* "expressly recognized" that Section 5 applies to the judiciary. J.S. App. 180a. The Justice Department ignored the fact that its stated reason for opposition under Section 5 to additional judgeships in Louisiana was based *solely* on its belief that the Louisiana "system" of electing judges violated Section 2. *See* J.S. App. 160a, 176a.

"revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285, 303 (M.D. La. 1988). Judge Parker, however, reversed himself after the remedy trial, holding that the court "lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to 'guilty' districts." *Clark v. Roemer,* Remedy Opinion p. 3. Despite this reversal, the Justice Department still holds firm to the position rejected in *Gingles* that Louisiana must adopt a "systemic" remedy.

The Justice Department's refusal to preclear the additional Louisiana judgeships also violates the Department's internal rule requiring that preclearance determinations be guided by relevant federal judicial decisions. *See* 28 C.F.R. ch. 1 (7-1-89 Edition) § 51.56. Relevant judicial decisions ignored by the Justice Department include the decision in this case, the Fifth Circuit's decision in *LULAC*, and this Court's decision in *Gingles*.[30]

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[30] On October 17, 1990, Louisiana filed a Motion Asserting Constitutional Challenge with accompanying memorandum. The memorandum noted that the Justice Department's application of § 5 to forbid Louisiana from adding judgeships to an at-large, majority vote, designated post system was unconstitutional as applied because the Justice Department had approved the same type of judicial election system in Alabama and Texas. The Lawyers' Committee for Civil Rights (counsel for appellant in this case) had objected to preclearance of Alabama statutes providing for election of judges because such statutes provided for the election of judges at-large, by numbered posts, with a majority vote requirement. *See* Memorandum in Support of Constitutional Challenge, pp. 3-4. Nevertheless, the Justice Department approved those Alabama acts. Memorandum in Support of Constitutional Challenge Ex. 3. Ultimately,

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The Justice Department contends that it is above (or outside) of the law as established by this and other courts and that its decision not to preclear these judgeships is unreviewable by any court. *See* Brief p. 23 n.19. Such an astonishing declaration is simply not the law, and the Justice Department's conduct in this case illustrates why such a principle ought not be the law. In *Georgia v. United States*, 411 U.S. 526 (1973), the Court determined the standard by which the Attorney General could object to implementation of a statute. Although members of the Court disagreed as to the proper standard, the Court unanimously rejected the Government's argument that the propriety of the objection was "outside the permissible scope of judicial inquiry." *Morris v. Gressette*, 432 U.S. 491, 516 (1977) (Marshall and Brennan, JJ., dissenting).

Thereafter, in *Morris v. Gressette*, 432 U.S. 491 (1977), a majority of the Court held that there could be no judicial review of the Attorney General's failure to interpose a timely objection under § 5:

> Nothing in our opinion in *Georgia v. United States* suggests that Congress did not intend to preclude judicial review of the Attorney General's failure to interpose an objection within 60 days of a complete submission. . . . Indeed, subsequent judicial review of the Attorney General's failure to interpose a timely objection to a complete submission would itself "add acrimony" by denying covered jurisdictions the statutorily prescribed "rapid method of rendering a new state election law enforceable."

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the three-judge court dismissed the Motion, holding that any such constitutionality challenge must be raised in the district court for the District of Columbia. *Clark v. Roemer*, Ruling on Motions (three-judge court) (February 22, 1991).

432 U.S. at 504 n.19, *quoting Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969). The Court did not overrule its decision in *Georgia*. *See Morris v. Gressette*, 432 U.S. 491, 516 (1977) (Marshall and Brennan, JJ., dissenting).

Holding that failure to take timely action is not subject to review is very different from holding that the Attorney General's decision to ignore rulings of this Court, the Fifth Circuit, the district court, and Justice Department regulations is unreviewable.[31] Justice White stated in *Georgia*, "Surely, objections by the Attorney General would not be valid if that officer . . . simply decided to object to all of [the § 5 submissions], to one out of 10 of them or to those filed by States with governors of a different political persuasion." *Georgia v. United States*, 411 U.S. 526, 543 (1973) (White, Powell, and Rehnquist, JJ., dissenting). Similarly, an objection is invalid if it rests on an illegal basis, such as the dislike of a State's pre-1965 election system. Allowing the Justice Department to refuse preclearance at its whim for reasons not contemplated by Section 5 means that determinations as to preclearance will depend on the prevailing political winds in the Justice Department.

A three-judge court in another judiciary voting rights case has severely criticized the Justice Department for ignoring judicial decisions when refusing preclearance:

> We close by expressing our concern at the actions taken, and the position expressed, by the

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[31] The Justice Department also cites this Court's *per curiam* decision in *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977). There is no intimation in that case that the Justice Department was refusing preclearance in defiance of judicial decisions, its regulations, and the Congressional decision that § 5 preclearance relates to *changes* in voting practices, not to review of pre-1965 voting practices.

Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. . . .

Despite [the *en banc* Fifth Circuit's] plain ruling [in *LULAC*], the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2 . . . . " During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible latter resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

. . . .

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through

> adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

Mexican American Bar Association of Texas v. Texas and *United States v. Texas, et al.*, Numbers 90-CA-171 and A-90-CA-1018 pp. 13-15, WL 252313 (Consolidated) (three-judge court) (W.D. Tex. December 26, 1990), *appeal docketed*, 59 U.S.L.W. 3615 (U.S. Feb. 27, 1991) (90-1352).

The Justice Department is attempting to make Louisiana change to a system of electing judges by sub-districts or by limited voting or cumulative voting. *See* J.S. App. 119a. Each proposed system is unworkable and undesirable. Electing judges by sub-district would create a system of "neighborhood judges" elected in small geographic areas. Before the Fifth Circuit's decision in *LULAC*, Judge Parker held that sub-districts would be the remedy for the Section 2 violations in this case. *Clark v. Roemer*, Remedy Opinion p. 52. Judge Parker was quick to point out some of the problems inherent in such a remedy:

> Creation of such sub-districts obviously generates other problems, such as compactness, equality of population, need for future modification because of additional judgeships or population changes and the potential or perceived potential for small election districts leading to "home town" justice, to name a few.

Clark v. Roemer, Remedy Opinion p. 49.

Possibly the most difficult problems to solve involve the "need for future modification because of additional judgeships or population changes." The proposed sub-districts were based on population and voting age population figures. Changes in population and the racial composition of population in sub-districts will inevitably occur. Thus, what may be a minority sub-district today may not be a minority sub-district tomorrow, requiring

periodic redrawing of sub-district lines. Indeed, because the proposed sub-districts were based on 1980 census figures, they are already obsolete. Further, judges may fear that as further redrawings occur, they will be placed in the same sub-district and forced to run against each other. They might therefore vie with one another to make sure that they do not write unpopular opinions.

Additional redrawing of sub-districts will be necessary as judges are added. Most governmental bodies (such as city councils, county governments, school boards, and the like) remain the same size. Judges, however, are added as the caseloads increase. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). If judges are elected from single-member sub-districts, each time a judge is added in a judicial district, all of the sub-districts will have to be redrawn.[32]

Because the electorate for a sub-district will be much smaller than the electorate for a judicial district, there will be the appearance (and possibly the reality) of "neighborhood judges" who are influenced by their constituency and the source of their campaign funds. Because of a fear of "home-town cooking," litigants may understandably opt more often for jury trials, clogging the court docket and slowing down the judicial process, as well as creating the need for more judges. And, as judges are added, lines will need to be re-drawn making the sub-districts smaller, which then increases the "neighborhood judge" problem so that more litigants opt for a

[32] Even with multi-member sub-districts, as a judge is added, the population per judge across the sub-districts within that district will no longer be approximately equal, so the lines will have to be withdrawn.

jury – in short, creating a vicious (and extremely expensive) circle.

The Justice Department also stated that Louisiana could adopt a system of limited voting, under which a voter can only vote for some of the positions on the ballot. Such a system would itself appear to violate the Voting Rights Act, which provides that nothing in the applicable subchapters "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C. § 1973n.[33] Limited voting was rejected as a judicial remedy in Voting Rights Act cases, including *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988), and *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).[34] Further, Judge Parker rejected it as a Section 2 remedy in this case, after hearing uncontested testimony that it exists in only approximately 200 of the more than 86,000 local governmental units in this country. *Clark v. Roemer*, Remedy Opinion pp. 51-52.[35] Under cumulative voting a voter can vote more than once for a single position on the ballot. Thus, if there were eight judgeships for which elections were being held, all eight

[33] Judge Parker rejected limited voting as a remedy, stating "this court finds it difficult to comprehend how we expand access to the ballot box by limiting the number of votes each elector may cast." *Clark v. Roemer*, Remedy Opinion p. 52.

[34] Pennsylvania has determined that limited voting for judges violates its Constitution. *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983).

[35] Testimony was adduced at the remedy trial of this case concerning workability problems of limited voting. This evidence is summarized in the Posttrial Brief on Behalf of the State of Louisiana, March 5, 1990, pp. 40-46.

votes could be cast for one judicial candidate. Cumulative voting has been characterized as a form of proportional representation, which is, of course, forbidden under § 2(b). Grofman, "Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues" 107, 121-22 in B. Grofman, A. Lijphart, R. McKay, & H. Scarrow (eds.), *Representation and Redistricting Issues* (Lexington Books 1982).

Even if, however, the State of Louisiana were to adopt limited voting or cumulative voting for the unprecleared judgeships and even if the Justice Department approved this method of election, such a method of voting would not be workable. The majority of the unprecleared judgeships are situations in which one judgeship has not been precleared in a judicial district, although all of the other judgeships have been precleared.[36] Given that limited voting means a voter must vote for less than all of the seats to be elected, there is no way for a voter to vote for less than one judgeship and thus no way to "limit" the voting population. Similarly, there is no way to "cumulate" one vote. Either remedy would also be unworkable even in the few districts where more than one judgeship was not precleared. Explaining to voters that they could vote for all of some judgeships (the precleared judgeships) but only a limited number of the other judgeships (the unprecleared judgeships) would be an impossible task. Alternatively, instructing voters

[36] This situation exists in the First, Fourth, Sixteenth, Eighteenth, Twenty-First, Twenty-Third, Twenty-Seventh, Twenty-Ninth, and Thirty-Ninth Judgeships, as well as in the Second and Third Circuits. *See Clark v. Roemer*, Order of the Three-Judge Court, October 22, 1990, J.S. App. 68a, 70a-71a.

that they could vote one time for each of some judgeships (the precleared judgeships) but could cumulate their votes for one or more of the other judgeships (the unprecleared judgeships) would be just as difficult. In short, using either system for the unprecleared judgeships (which are the only judgeships that can violate Section 5) would create a smorgasbord of an election system with varying scenarios, the impracticability of which is obvious. The time-honored system of electing judges in Louisiana, to which the Justice Department cannot object under Section 5, is certainly much more workable and desirable.

III. THE THREE-JUDGE COURT WAS CORRECT IN DETERMINING THAT ELECTIONS FOR CERTAIN UNPRECLEARED JUDGESHIPS SHOULD GO FORWARD AND THAT THE WINNERS SHOULD SERVE "PROVISIONALLY."

The appellants argue that the three-judge court erred in permitting the November 6, 1990, and December 8, 1990 elections to be scheduled for positions which the court held had not been precleared. 751 F. Supp. at 590-91, J.A. App. 14a-17a. This Court overruled the three-judge court and enjoined the elections. ___ U.S. ___, 112 L.Ed.2d 390 (1990). Louisiana is now seeking in the district court of the District of Columbia to have those positions precleared. Therefore, the question of whether these elections should have been held in November and December 1990 is moot.[37] Nevertheless, as the appellants

[37] The United States in its *amicus* brief states that this is not moot because the elections could be rescheduled. The elections were originally scheduled by the three-judge court.

(Continued on following page)

have posed the question whether the three-judge court erred, this brief will argue that the three-judge court correctly exercised its discretion in allowing the elections.

The three-judge court engaged in a delicate balance in determining to hold the elections, carefully weighing the interests of Louisiana citizens, Louisiana voters, the plaintiffs, state and local officials, judicial candidates, litigants, and the Louisiana criminal justice system. 751 F. Supp. at 594-95, J.S. App. 36a-39a. First, the court recognized that "the [appellants'] request for an injunction of the unprecleared judicial positions came very close to the October 6 election day." 751 F. Supp. at 594, J.S. App. 33a-34a.[38]

The three-judge court also noted that the *LULAC* decision had recently been rendered, and that thereafter Judge Parker had dismissed the Section 2 claims. Further, at the time of the hearing, this Court had not issued its summary affirmance in *Brooks v. Georgia State Board of Elections*, ___ U.S. ___, 112 L.Ed.2d 243 (1990), which case posed for the first time whether Section 5 applied to the mere addition of judgeships. 751 F. Supp. at 594, J.S. App. 34a-35a.[39]

(Continued from previous page)

One doubts that the three-judge court would reschedule them in the face of this Court's reversal, especially given that part of the reason for allowing the elections was that the campaign was underway and that the election was scheduled when there would be other major elections so as to ensure high voter participation. 751 F. Supp. at 594, J.S. App. 33a-34a.

[38] *See* page 43 *infra*.

[39] This Court has stated that in determining relief in a Section 5 case a court should consider whether the law is settled. *Perkins v. Matthews*, 400 U.S. 379, 396 (1971).

The three-judge court cited decisions of this Court allowing elections under an unprecleared statute to stand pending the authority involved seeking approval. *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971); *Berry v. Doles*, 438 U.S. 190, 192 (1978).

In *Georgia v. United States*, 411 U.S. 526 (1973), the three-judge court held that Section 5 preclearance had not been received from the Attorney General or the district court for the District of Columbia. *Id.* at 527. Accordingly, the three-judge court enjoined the pending elections. *Id.* This Court, however, allowed the elections to occur. *Id.* After hearing the resulting appeal and affirming the three-judge court, this Court still did not invalidate the elections held under an unprecleared plan. *Id.* at 541.

United States v. County Commission, Hale County, 425 F. Supp. 433 (S.D. Ala. 1976) (three-judge court), *aff'd mem.*, 430 U.S. 924 (1977), involved an order very similar to the one issued by the three-judge court here. There the Justice Department sought to enjoin pending County Commissioner elections in Alabama because they were to be elected under an unprecleared at-large plan. 425 F. Supp. at 434. The three-judge court nevertheless allowed elections to be held two and one half weeks thereafter, stating that the persons elected would serve "provisionally." *Id.* at 436. The decision of the three-judge court was affirmed by this Court.[40] An election with provisional winners was

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[40] The Justice Department in its *amicus* brief states that this Court's affirmance in *Hale County* was not a judgment on the merits of the remedy, and that "[t]he published opinion gives no indication that the validity of the remedy was at issue between the parties." p. 18 n.15. Of course, the plaintiff party

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also allowed in *Moore v. LeFlore County Board of Election Commissioners*, 351 F. Supp. 848 (N.D. Miss. 1971) (three-judge court).

IV. JUDGES ELECTED DURING 1990 TO UNPRECLEARED POSITIONS SHOULD NOT BE REMOVED FROM OFFICE.

Some persons ran unopposed for judgeships and were declared elected at the end of the qualifying period. Others won an absolute majority in the initial election held on October 6, 1990. Although the appellants filed a request for an injunction in July 1990, no hearing was scheduled until long after the qualifying period had ended and shortly before the October 6, 1990 election. The three-judge court denied the request to enjoin the election, and no appeal was made to this Court. All individuals who were elected have been given their judicial commissions and are serving as judges.

The appellants have made no attempt in the three-judge court to unseat these judges.[41] Justice Powell has

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in that case was the very same Justice Department. If the Justice Department was opposed to the concept of election of provisional winners in unprecleared positions, one would think it would have appealed to this Court and made "the validity of the remedy . . . a[n] issue between the parties."

[41] Indeed, counsel of record for the appellants stated at a December 20, 1990, hearing that he would not be seeking action by the three-judge court to unseat those judges:

> MR. McDUFF: Now, in all candor, with respect to the first category of judgeships that were elected either in July without opposition or on October 6th, the Supreme Court did not specifically enjoin them

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commented that raising the issue of remedy in this Court initially is untimely: "As a general rule, this Court does not and should not allow parties or amici to raise issues here that were not raised in or ruled upon by the lower courts. Neither should this Court encourage parties to bypass avenues of relief that are open to them in the lower courts." *Berry v. Doles*, 438 U.S. 190, 199 (Powell, J., concurring in the judgment).

Moreover, this Court has held that the local three-judge court should determine the proper remedy in a Section 5 case. For example, in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), the Court stated:

> As we noted in *Perkins v. Matthews*, a local district court is in a better position than this Court to fashion relief, because the district court "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence.

(Continued from previous page)

> from taking office in its injunction. And in the Hunter case which was a case coming out of Monroe City Court which we asked the Supreme Court to enjoin people from taking office after they had been elected because the timing was such that an application was not made to the Supreme Court for election, and they turned us down on a seven to two vote.
>
> So, to me that means that the Supreme Court did not specifically, in this case, enjoin the people elected in July through qualification or October 6th from taking office. So we are not going to take the position in this court that they should be kept from taking office. We do think, of course, it is still an unprecleared judgeship and that eventually something further is going to happen with it.

Transcript of Hearing in *Clark v. Roemer*, December 20, 1990.

457 U.S. at 270 (citations omitted). Louisiana submits that the three-judge court should address the question of remedy, taking evidence as to the proper remedy for the unprecleared judgeship in each affected district.[42]

This Court has in the past refused to set aside elections held under statutes that have not been precleared, holding that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." *Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971); *accord, Berry v. Doles*, 438 U.S. 190 (1978); *Allen v. Board of Elections*, 393 U.S. 544, 571-72 (1969).[43]

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[42] In its *amicus* brief the United States has recognized that the proper remedy may vary from district to district, and agreed that elections should not be set aside if there is "a demonstration that the seats involved must be filled and that no alternative means of filling them is practicable." p. 28.

[43] This Court has taken varying positions as to whether the "approval" to be sought was (a) from the Justice Department only, or (b) from either the Justice Department or the district court in the District of Columbia. In *Allen*, the Court refused the Solicitor General's suggestion that the elections should be set aside "if the State does not promptly institute § 5 approval proceedings." 393 U.S. at 571. Justice Harlan stated that they should be set aside "[u]nless Mississippi promptly submits its laws to either the Attorney General or the District Court for the District of Columbia." 393 U.S. at 594 (Harlan, J., concurring and dissenting). *Perkins* mentioned "federal approval." 400 U.S. at 396. *Berry* referred to submission "to a forum designated by Congress" for "approval." 438 U.S. at 192-93. Finally, in *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-3 (1985), the Court required submission

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In *Berry v. Doles*, 438 U.S. 190 (1978), an action was filed in a three-judge court shortly before a primary election to enforce the requirements of § 5 and to prevent the pending election. The requests for declaratory and injunctive relief were not acted upon until after the scheduled primary election and the subsequent run-off election. The three-judge court afforded prospective relief only by enjoining further enforcement of the statute but did not set aside the results of the elections. On appeal, this Court refused to void the elections, holding:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election.

438 U.S. at 192-93.

Even more recently, in October, 1990, a three-judge court refused to enjoin plaintiffs' request to enjoin a City Court election in Monroe, Louisiana, based on the failure to obtain preclearance. *Hunter v. City of Monroe*, Docket No. 90-2031 (W.D. La. November 7, 1990) (three-judge court) (unreported opinion). Like the appellants here, the plaintiffs in that case did not appeal denial of the

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to the Attorney General for his approval, failing which the results of the election would be set aside. The Justice Department recognized this varying treatment in its *amicus* brief in this case. p. 17 n.14.

injunction to this Court. Instead, two weeks after the election, they filed a Motion for Reconsideration, Certification, and Comprehensive Relief. The three-judge court allowed certification of the winners. Thereafter, the plaintiffs filed an Application for Stay and Injunction Pending Appeal with this Court, which application sought to prevent the elected judges from taking their seats. No. A-363. Circuit Justice Scalia turned the application over to the entire Court, which denied the request 7-2. *Hunter v. McKeithen*, ___ U.S. ___, 112 L.Ed.2d 517 (1990). An appeal from the three-judge court decision is pending in this Court. *Hunter v. McKeithen*, No. 90-1187.

Appellees submit that the decision by this Court in *Hunter* is applicable here. Indeed, the argument against throwing these judges out of office is even stronger because these judges have already been seated and are acting on a heavy docket of cases.

In *Georgia v. United States*, 411 U.S. 526 (1973), this Court determined that even though § 5 was applicable to the reapportionment plan at issue, "it would be inequitable to require new elections at this time." 411 U.S. at 541. The Court reasoned that elections had been conducted under a disputed plan by reason of the Court's stay order. Here the elections were conducted under orders of the three-judge court, and neither the appellants nor the Justice Department sought an injunction of these elections by this Court. Under these circumstances the elections should stand.

One important factor to be considered in determining whether to invalidate elections is "whether it was reasonably clear at the time of the election that the changes were covered by § 5." *Perkins v. Matthews*, 400 U.S. 379, 396 (1971). The Fifth Circuit held in *LULAC* that § 2 of the Voting Rights Act does not apply to the judiciary. 914 F.2d 620 (5th Cir. 1990) (*en banc*). The three-judge court held in

this case that § 5 of the Voting Rights Act is applicable to certain additional judgeships, but that pending elections for those judgeships should nevertheless go forward. 751 F. Supp. at 590-91, J.S. App. 14a-15a. This Court, however, enjoined such elections. *Clark v. Roemer*, ___ U.S. ___, 112 L.Ed.2d 390 (1990), *modified*, ___ U.S. ___, 112 L.Ed.2d 391 (1990). The three-judge court in *Hunter v. City of Monroe* held that § 5 of the Voting Rights Act does not apply to the "addition of more judges, to be elected by the same voters who elect the present judges, and whose jurisdiction will be exactly the same as that of the existing judges." Docket 90-2031 (W.D. La. November 7, 1990) (three-judge court) (unreported opinion). This Court refused to grant an injunction sought by the petitioners to prevent the elected judges from taking their seats. *Hunter v. McKeithen*, ___ U.S. ___, 112 L.Ed.2d 517 (1990). In *Brooks v. Georgia State Board of Elections*, No. C.V. 288-146 (S.D. Ga. Dec. 1., 1989) (three-judge court), *aff'd mem.*, ___ U.S. ___, 112 L.Ed.2d 243 (1990), a federal court held for the first time that the addition of judgeships was covered by Section 5. Given these varying decisions, it cannot be said that the law in this area is "reasonably clear."

The appellants suggest a time limit of January 1, 1992, to "give the district court an opportunity to consider the propriety of filling the seats through some method such as special elections." p. 35. Holding "special elections" in the interim makes some sense when the Section 5 case involves a change in the election system, such as the change from simultaneous elections to staggered elections in *Berry v. Doles*, 438 U.S. 190, 193 (1978), as there an election could be held under the "old" system. Here, however, the change attacked is the addition of another judge, who is elected in precisely the same manner as every other judge. There is thus no "old system" to

go back to for a special election because Louisiana seeks to elect the additional judge under the "old system."[44]

The election of unopposed candidates to judgeships and the October 6, 1990, elections should stand, and these judges should be allowed to continue to serve provisionally pending a judicial determination in the preclearance action in the district court in the District of Columbia.

CONCLUSION

For the foregoing reasons, the three-judge court correctly concluded that certain judgeships had been precleared. The Justice Department cannot use § 5 to attack an existing "system" for electing Louisiana's judiciary. The three-judge court did not err in refusing to enjoin the November 6 and December 8, 1990 elections. Judges who have been elected and are currently serving should not be thrown out of office.

All of the above and foregoing is thus respectfully submitted.

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April 4th, 1991

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[44] This further underlines the impropriety of the Justice Department using Section 5 to try to change Louisiana's long-standing "system" of electing judges. *See* pages 25-41 *supra*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF MISSISSIPPI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 87-3464 (LFO) (CRR) (DBS, U.S.C.A.)

UNITED STATES' RESPONSE TO STATE OF MISSISSIPPI'S FIRST SET OF INTERROGATORIES TO DEFENDANT

INTERROGATORY NO. 1

(a) Describe each of your policies, practices and/or procedures, formal and informal, internal or publicly published, in effect at any time regarding the preclearance of statutes which provides for election schemes containing majority vote, anti-single-shot voting, numbered post or numbered place, at-large voting requirements, and/or which transform a single-member election district into a multi-member election district, under Section 5 of the Voting Rights Act;

(b) Identify all documents and oral communications referring or relating to the subject matter of this interrogatory; and

(c) Identify all persons with knowledge of the subject matter of this interrogatory.

* * *

INTERROGATORY NO. 11

State whether you have ever precleared under Section 5 of the Voting Rights Act any statute(s) of a State or other covered jurisdiction other than Mississippi, *e.g.*, Alabama, which provided for the election of judges in at-large district-wide voting with separate numbered places for each position. If your response is in the affirmative,

(a) Identify the statute(s) by citation to its Chapter, Section and Law number;

(b) Explain the basis upon which you granted preclearance to the statute(s);

(c) Explain the differences between such statute(s) and the Mississippi statutes referred to in Appendix A which led to preclearance of such statute(s) and your objection to preclearance of the Mississippi statutes;

(d) Explain the differences between the benchmarks in the States or other covered jurisdictions as to which such preclearance was granted and the benchmarks in Mississippi in effect on November 1, 1964;

(e) Identify all documents and oral communications referring or relating to the subject matter of this interrogatory; and

(f) Identify all persons with knowledge of the subject matter of this interrogatory.

RESPONSE TO INTERROGATORY NO. 11

(a), (e) On several occasions the Attorney General has precleared Alabama statutes which established districts with more than one judge or added judges to existing districts, and provided that these judges would be elected at large, districtwide. On several occasions the

Attorney General has precleared Louisiana statutes which added judges to existing districts and provided that these judges would be elected at large, districtwide. Although these statutes denominate numbered posts for each such judge, a statute of general application antedating the Voting Rights Act required that each such judge be elected by a numbered post so that such designation of positions was not a change subject to the Section 5 preclearance requirement.

There may be other examples of statutes that have been precleared under Section 5 and which meet the criteria set out in this interrogatory. As explained in our response to Interrogatory No. 10, information regarding all of these submissions can be obtained from the Section 5 files maintained in the Voting Section, which are generally available for public inspection. Voting Section personnel will be available to assist representatives of the plaintiff in locating and inspecting such files.

(b)-(d), (f) See our response to Interrogatory No. 10(d)-(e), (g).

* * *

To the extent this interrogatory seeks information on expert witnesses, the United States responds that it has not yet identified anyone it expects to call as an expert witness at trial.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF MISSISSIPPI, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 87-3464

DECLARATION OF LORA L. TREDWAY

Pursuant to 28 U.S.C. 1746, I, LORA L. TREDWAY, make the following declaration:

1. I am an attorney for defendant United States of America in the instant case.

2. I am informed of the facts in this case and I have read the Plaintiff State of Mississippi's First Set of Interrogatories to Defendant.

3. I prepared and signed the foregoing answers and objections to Plaintiff State of Mississippi's First Set of Interrogatories to Defendant and they are true and correct to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 1988.

/s/ Lora L. Tredway
LORA L. TREDWAY

No. 90-952

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-952

JANICE G. CLARK, *et al.*,
Appellants,

v.

CHARLES "BUDDY" ROEMER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana

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REPLY BRIEF FOR APPELLANTS

INTRODUCTION

Throughout the brief of the appellees runs a continuing diatribe against the reasoning of the Attorney General's Section 5 objections in this case. Long-settled principles, however, demonstrate that the court below, and this Court on appeal, have no jurisdiction to review the substance of the Attorney General's Section 5 decision. *Allen v. State Board of Elections*, 393 U.S. 544, 559, 570 (1969); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645-646 (1977); *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983); *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). As for the appellees' incessant criticism of the Attorney General, suffice it to say at this point that racial discrimination is a serious problem in the election of state court judges in many parts of Louisiana, and the Attorney General's well-documented objection letters show that he did the job

Congress assigned to him when he objected to uncleared at-large elected judgeships in some of the state's judicial districts. (J.S. App. 108a, 127a, 142a). *See also, Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988) (decision of the single-judge district court in the Section 2 case outlining extensive racial discrimination in judicial elections in Louisiana).

Section I of this reply brief will respond to part II of the appellees' brief, which challenges the overall validity of the Attorney General's objections and relies upon grounds different from those relied upon by the district court. The remainder of this reply brief will then address the other issues in the order originally presented in the Brief for Appellants.

I. BY FAILING TO CROSS-APPEAL, APPELLEES HAVE WAIVED ANY CHALLENGE TO THE OVERALL VALIDITY OF THE ATTORNEY GENERAL'S OBJECTIONS, AND EVEN IF THE CHALLENGE IS NOT WAIVED, THE ATTORNEY GENERAL'S OBJECTIONS ARE NOT REVIEWABLE IN THIS CASE.

Part II of the appellees' brief is, for the most part, a criticism of the Attorney General's substantive decision to interpose objections. In particular, the brief claims the Attorney General employed an improper rationale by objecting to what the appellees call the "system" of electing the new judges when most of the changes that triggered his review were the addition of new judgeships to a pre-existing "system." (Brief for Appellees at 28, 30-31). In addition, appellees assert that the Attorney General failed to withdraw his objections after the Fifth Circuit's September 28, 1990 holding that Section 2 is inapplicable to judicial elections, *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, 112 L.Ed.2d 838 (1991), and thereby contravened his own regulation stating he will be guided by relevant

court decisions. (Br. for Appellees at 32-33).[1] Accordingly, the appellees seem to contend the Attorney General's objections were invalid, and although appellees do not come out and say it, they apparently want this Court to set aside the objections. (*Id.* at 34a-35a).[2]

As an initial matter, it appears appellees have waived these issues by failing to cross-appeal. In the absence of

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[1] Appellees also insist that the Attorney General's objections did not follow *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986), and the single-judge district court's June 12, 1990 opinion in the remedy phase of the Section 2 portion of the present case because the objections were not "district-specific" and instead went to Louisiana's entire "system" of trial and appellate court elections. (Br. for Appellees at 32-33). That is simply wrong. The Attorney General's objections have not gone to the entire "system" in every judicial district in the state, but instead to at-large elected judgeships in specific districts where the evidence demonstrates discrimination in the election of those judgeships. As for other districts where the Attorney General concluded there was no discrimination, the at-large judgeships have been precleared. (See, e.g., J.S. App. 129a, 139a-140a, 184a-186a).

[2] There appears to be no claim by the appellees that these new judgeships were not voting *changes* subject to Section 5 review. To the contrary, appellees seem to concede they were changes.

> Rather than examining the proposed *changes*, the Department refused preclearance because of the existence of Louisiana's "at-large system with designated posts and a majority vote requirement." J.S. App. 132a. That "system," however, was not changed in any way by the submitted act.

(Br. for Appellees at 28, emphasis added). Indeed, this Court's precedents demonstrate that the addition of judgeships within existing election districts constitutes a change under Section 5. *See, Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S.Ct. 288 (1990); *Haith v. Martin*, 618 F. Supp. 410, 411-413 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986); *City of Lockhart v. United States*, 460 U.S. at 131 (the addition of new seats on a city governing body is a voting change that must be precleared); *Allen v. State Board of Elections*, 393 U.S. at 566-567 (Congress intended Section 5 "to reach *any* state enactment which alters the election law of a covered state in *even a minor way*" and intended "to give the Act the broadest possible scope.")

a cross-appeal or cross-petition, this Court has said an appellee or respondent may raise an alternate ground for defending the judgment below only if "affirmance on the alternate ground would neither expand nor contract the rights of either party established by the judgment below." *Granfinanciera, S.A. v. Nordberg*, 106 L.Ed.2d 26, 38-39 (1989).[3] Here, the appellees' claim that the Attorney General's objections were invalid would, if successful, lead to a wholesale cancellation of practically all of the Attorney General's objections and the denial of all relief to the appellants. Although the appellants contend they did not receive sufficient relief in the district court, they did receive some relief. Elections were enjoined by the district court for three seats, (J.S. App. 77a-78a), and the appellees are enjoined from permitting the winners of certain other elections to serve over 150 days after any final denial of preclearance in the District of Columbia litigation. (*Id.* at 76a). However, if appellees were successful on these issues and thereby invalidated the Attorney General's objections, the district court would be required to dismantle what little relief it has given. This would, in the words of the *Granfinanciera* case, "expand [and] contract the rights . . . established by the judgment below," and is therefore not a ground for affirming the judgment below. "An argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed." *Trans World Airlines v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Given

[3] *Granfinanciera* dealt with a petition for writ of certiorari and the failure to cross-petition, but the reasoning would also appear to be applicable to appeals. Rule 18.6 of the Rules of this Court, dealing with appeals, states that "[t]he Court may permit the appellee to defend a judgment on any ground . . . that would not expand the relief granted."

that the appellees did not cross-appeal, the issues are waived.[4]

Turning to the merits of these issues, the appellees challenge the reasoning of the Attorney General's objections, claiming it is improper because it focused not on the addition of new judgeships but instead on the incorporation of pre-existing election mechanisms used in the election of those new judges. They also contend the reasoning was flawed because the Attorney General did not withdraw his objection after the Fifth Circuit's decision in *LULAC*. However, as this Court has stated time and again, a review of the Attorney General's substantive reasoning is not within the ambit of Section 5 enforcement actions brought in federal court in the covered jurisdictions. *Allen v. State Board of Elections*, 393 U.S. at 559, 570; *Perkins v. Matthews*, 400 U.S. at 385; *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645-646; *City of Lockhart v. United States*, 460 U.S. at 129 n.3; *McCain v. Lybrand*, 465 U.S. at 250 n.17.[5] It would greatly complicate the long-established

[4] The failure to cross-appeal also would waive any claim that the addition of the judgeships was not a voting change covered by Section 5. (See footnote 3 of this brief).

Even if these alternative grounds could sustain the judgment below, they were not raised or identified as grounds for sustaining the judgment in the Motion to Dismiss or Affirm filed by the appellees. *See, Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985). One commentator has said:

> Since the motion to dismiss or affirm serves the same basic function as a brief in opposition, an appellee should present in the motion to dismiss or affirm all available arguments as to why the appeal should be dismissed or the judgment affirmed.

13 Moore's Federal Practice Para. 818.30[1].

[5] In Section 5 enforcement actions such as this, the only questions at issue are "(1) whether a change is covered by Section 5, (2) if the change is covered, whether Section 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. at 250 n.17.

scheme of Section 5 enforcement for the federal courts in the covered jurisdictions to examine the reasoning of each of the Attorney General's objections to determine their propriety. It also would violate the intent of Congress, which designated the federal district court for the District of Columbia as the only court to make substantive decisions about the appropriateness of preclearance, with direct appeal to this Court.

Moreover, even if the Attorney General's reasoning were an issue in this case, it is abundantly clear that the Attorney General's review can and should consider pre-existing election features that are carried forward as part of a voting change. This Court in *City of Lockhart v. United States*, a Section 5 declaratory judgment action filed in federal district court in the District of Columbia, said that a voting change adding new seats to a city governing body must be examined in light of the pre-existing election features. "The possible discriminatory purpose or effect of the new seats, admittedly subject to Section 5, *cannot be determined in isolation from the "pre-existing" elements of the council.*" 460 U.S. at 131 (emphasis added).

With respect to *LULAC*, nothing required the Attorney General to withdraw his objection after the *LULAC* decision. Even if *LULAC* were correct—a proposition disputed by the appellants and the Attorney General—it deals only with Section 2 and not Section 5. To the extent the Attorney General's objections rested in part upon Section 2's prohibitions, nothing requires the Attorney General to follow every federal court decision from around the country regarding the interpretation of Section 2, particularly when the decisions are conflicting. His internal regulations state that he will be "guided by the relevant decisions" of this Court and other federal courts. 28 C.F.R. 51.56. However, that does not mandate that he, for instance, apply one rule in the Fifth Circuit because of the *LULAC* decision and apply another

in the Eleventh Circuit, which is not shackled by *LULAC*. While he will look for guidance in relevant court decisions, he ultimately makes his own decision in light of what he perceives to be the relevant facts and law, as does the federal district court for the District of Columbia when it decides a preclearance request.

The appellees conclude part II of their brief by stating that the "Justice Department is attempting to make Louisiana change to a system of electing judges by subdistricts or by limited or cumulative voting," (Br. for Appellees at 37), and then by launching into an inaccurate discourse about what the appellees perceive to be the drawbacks of each of these methods of election. (*Id.* at 37-41).[6] First of all, the pros and cons of potential remedies have little relevance in this case, where the merits of the Attorney General's objections are not under review. Moreover, the Attorney General is not trying to "make" Louisiana do anything except comply with Sec-

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[6] Among the many inaccuracies are the statement that multimember subdistrict lines must constantly be redrawn as new judges are added because "the population per judge across the subdistricts within the district will no longer be approximately equal." (Br. for Appellees at 38 n.32). Because the one person-one vote rule does not apply to judges, it is quite easy to add each new judge to an existing subdistrict in a rotating order.

Also, the appellees profess concern about small subdistricts leading to "'neighborhood judges' who are influenced by their constituency and the source of their campaign funds," and who will indulge in "home-town cooking." (Br. for Appellees at 38). What they fail to mention is that Louisiana already has some very small single-member judicial election districts, several under 20,000 population and some right around 10,000. (See Attachment A to document #188 in the record). Those districts are majority white and no one seems too concerned about corrupt "neighborhood judges." But once the possibility of majority black districts—all of which would be larger than these existing single-member districts—comes into play, the State officials suddenly become very concerned about the possibility of corruption. Their perspective is distorted and their newfound concern with small election districts is inconsistent with existing state policy.

tion 5 by adding new elected judgeships in a manner that does not discriminate. The choice of the method belongs to the State. Finally, while the appellees insist that "[t]he time-honored system of electing judges in Louisiana . . . is . . . workable and desirable," (*id.* at 41), they ignore the fact that the Attorney General has concluded the addition of new at-large elected judgeships in some of the districts perpetuates illegal racial discrimination. Given that the "time-honored system" has so thoroughly excluded black people in some parts of Louisiana, Section 5 requires that its discriminatory elements not be continually replicated in new voting changes.

II. CONTRARY TO THE APPELLEES' CONTENTION, *McCAIN v. LYBRAND* CONTROLS THIS CASE AND DEMONSTRATES THAT THE VOTING CHANGES TO WHICH THE ATTORNEY GENERAL OBJECTED HAVE NOT BEEN RETROACTIVELY CLEARED BY THE PRECLEARANCE OF OTHER VOTING CHANGES.

As noted in the appellants' initial brief, *McCain v. Lybrand* holds that the later preclearance of voting changes does *not* clear earlier unsubmitted changes, even in the same election district. According to appellees, however, *McCain* is "easily distinguishable" from the present case because the earlier uncleared change in *McCain* was "dramatic" and "created a completely new method of electing the county government," while here "almost all of the [prior] unprecleared acts merely provided for an additional judgeship in various districts." (Br. for Appellees at 11, 13-14, footnote omitted).

Contrary to appellees' analysis, nothing in *McCain* suggests that its reasoning goes only to those prior uncleared changes that are "dramatic" or create "a completely new method" of election. Instead, *McCain* holds that the submission and preclearance of a voting change does not constitute a submission or preclearance "of changes made by previous legislation which themselves were independently subject to Section 5 preclearance." 465 U.S. at 256. Thus, by its own terms, *McCain*'s reasoning applies to *any* prior uncleared change independently subject to the preclearance requirement, whether a major or minor change.

Moreover, it would be totally out of keeping with the statutory language and construction of Section 5 to suggest that major or "dramatic" changes could not be retroactively cleared, while minor or "undramatic" changes could be. The language of Section 5 does not distinguish between major and minor changes, and this Court as early as *Allen v. Board of Elections* made it clear that Congress intended Section 5 to be fully applicable to changes "which alter[] the election law of a covered state in even a minor way." 393 U.S. at 566. Imposing a distinction between major and minor changes upon Section 5 jurisprudence would put the federal courts of the covered jurisdictions in the tricky business of determining which changes are major and which are minor—a business for which no statutory guidelines exist. That would exceed the limited role carved out for those courts in Section 5 enforcement proceedings, *see*, *United States v. Board of Supervisors of Warren County*, 429 U.S. at 645-646, and would be inconsistent with efficient enforcement of the Act. In passing Section 5, Congress required independent review of *all* voting changes, major or minor, dramatic or not.

The remainder of the appellees' discussion of this general issue goes only to the reasoning of the Attorney General's objections, accusing the Attorney General of "inconsistencies" and "anomalies." (Br. for Appellees at 16-17). As stated earlier, such criticisms of the Attorney General's decisions are not relevant in this proceeding.[7]

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[7] To the extent there were "inconsistencies" between the Attorney General's earlier preclearances and his later objections, those "inconsistencies" do not invalidate the objections. Moreover, there

Most of the situations in which the district court held voting changes to have been retroactively cleared involved the preclearance of later at-large judgeships that the district court said automatically cleared earlier at-large judgeships in the same election district. Four exceptions to this general pattern exist. (Br. for Appellants at 7-10, 22-24). As stated at page 24 of appellants' initial brief, this Court can reverse the district court because of the district court's general rule on this point without sorting out the details of these four situations. Meanwhile, the appelees' discussion of these matters (Br. for Appellees at 21-25) requires brief responses to only three points.

First, appellees are wrong when they say the issue surrounding the First Circuit Court of Appeals involves "the division of the First Circuit into districts." (Br. for Appellees at 21). Instead, it involves the creation of designated divisions, which are the equivalent of numbered posts, in the First Circuit. (Br. for Appellants at 7-8, 22-23). Second, with respect to the split of the 10th and the 39th judicial districts, the appellees attempt to distinguish *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978). (Br. for Appellees at 23-24). However, the distinctions they list in no way undermine the relevance of *Sheffield*, which was based in large part on the conclusion that "the Attorney General did not intend to approve the proposed change" that was the subject of the referendum, even though he approved the referendum itself. 435 U.S. at 137. Here, the preclearance clearly went only to "the special election" for

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appears to be a quite logical explanation. The Attorney General began interposing objections to uncleared at-large judgeships in some judicial districts in Louisiana when he was confronted with evidence of extensive racial discrimination in the at-large election of judges in those districts. (J.S. App. 108a, 127a, 142a). The fact that he did not object to some of the judgeships in earlier years in no way required him to close his eyes to the evidence of discrimination once it came to his attention.

the referendum. There is absolutely no indication the Attorney General intended to preclear the split, and there is no proof the split itself was called to his attention in the State's submission. (J.A. 101-102). Third, the appellees' assertion that the Attorney General approved an additional judgeship in the 20th Judicial District is unaccompanied by any citation to the record. (Br. for Appellees at 24). Contrary to the appellees' representations, the Attorney General never precleared an additional judgship for the 20th district. (See Br. for Appellants at 9-10, 23-24, and record citations therein).

III. THE CHALLENGE TO THE DISTRICT COURT'S RULING PERMITTING ELECTIONS TO GO FORWARD AND PERMITTING THE WINNERS TO HOLD OFFICE PROVISIONALLY IS NOT MOOT, AND THE DISTRICT COURT'S RULING WAS IN ERROR.

Appellants have challenged the district court's ruling that elections could go forward and winners can hold office provisionally even for judgeships the district court conceded had never been cleared. Appellees contend this question is moot. At the outset, they are incorrect when they imply the issue is limited to the propriety of holding the November 6 and December 8 elections that this Court enjoined. (Br. for Appellees at 41). The district court also permitted the October 6 elections to go forward even though it initially enjoined the winners from taking office. Eventually, however, it lifted that injunction and permitted those who won the October 6 election without the need for a November 6 runoff, and those who never had opposition, to take office and serve provisionally throughout the course of any Section 5 litigation instigated by state officials in federal district court in the District of Columbia. This Court's injunction did not prohibit those people from taking office. Thus, as a result of the district court's errors, the October 6 elections were held and people took office in many of the judgeships to

which the Attorney General objected. The matter is not moot.

There are other reasons why it is not moot. For instance, affirmance of the district court would permit that court to reschedule the elections this Court enjoined. In addition, if this Court were to reverse the district court's holding that various judgeships were cleared retroactively, the future status of those judgeships will be related to whether this Court affirms or reverses the district court's order permitting winners to serve provisionally in uncleared judgeships. Finally, whether the district court erred on this point is of future consequence inasmuch as the district court may be faced with the issue again if new judgeships are created in Louisiana to which the Attorney General objects.

As for the merits, the appellees point first to the district court's statement that "the request for an injunction of the unprecleared judicial positions came very close to the October 6 election day." (J.S. App. 33a-34a) (Br. for Appellees at 42). However, the district court did not consider this a waiver of the plaintiffs' claims, and did not deny the injunction because of the timing of the motion, inasmuch as the district court prefaced the above-quoted statement by saying "the Court does not intend to place the blame on any one party." (J.S. App. 33a-34a). Had the Court concluded the plaintiffs delayed to such an extent that the motion should be denied, surely it would have, in some sense, placed the blame upon them. Moreover, the plaintiffs first raised these issues nearly four years ago, in the 1987 amended complaint. Shortly after they learned the State was going to hold the elections in the fall of 1990, illegally and in defiance of the Attorney General's objections, the plaintiffs filed a motion for injunction in July of 1990, well before the initial October election date. The motion was not untimely. (See Br. for Appellants at 28-29; Br. for the U.S. as Amicus Curiae at 15).

Next, the appellees contend, "at the time of the hearing, this Court had not issued its summary affirmance in *Brooks v. Georgia State Board of Elections*, which case posed for the first time whether Section 5 applied to the mere addition of judgeships." (Br. for Appellees at 42, citation omitted). While the first hearing in this case was held prior to the October 15, 1990 summary affirmance in *Brooks*, the district court scheduled another hearing on October 18, at which time the *Brooks* affirmance was discussed in detail. Thus, the district court was aware of *Brooks* when it issued its October 22 order permitting the remaining elections to go forward and permitting winners to take office. Moreover, *Brooks* did not pose this issue for the first time. Over four years earlier, this Court summarily affirmed a district court decision applying Section 5 to the addition of judgeships in pre-existing districts. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). *See also, Kirksey v. Allain*, 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court) (holding Section 5 applicable to the addition of uncleared judgeships).

Finally, the cases cited by the appellees on this point (Br. for appellees at 43-44) have previously been discussed in the briefs of appellants (pages 29-30) and the United States (pages 16-19).

IV. CONTRARY TO APPELLEES' SUGGESTION THAT NO RELIEF BE AFFORDED, THIS COURT SHOULD ORDER THE ELECTIONS SET ASIDE AND REMAND THE MATTER TO THE DISTRICT COURT WITH INSTRUCTIONS THAT THE UNCLEARED JUDGESHIPS MAY NOT BE ALLOWED TO OPERATE PAST JANUARY 1, 1992.

In the event this Court holds that the district court erred in permitting the elections to go forward and the winners to take office, the question of relief will arise. The appellants have asked this Court to order the illegal

elections set aside in keeping with *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 182-183 (1985). In addition, the appellants have requested the case be remanded to the district court with instructions that the uncleared judgeships may not continue in operation past January 1, 1992 absent the holding of new elections that cure the Section 5 deficiencies found by the Attorney General. Alternatively, the appellants have asked this Court to set some other time limit or, at the very least, to require the district court to set its own time limit. (Br. for Appellants at 31-35).

By contrast, the appellees contend that even if this Court finds that the elections were held in error, absolutely nothing should be done and the illegal elections should be allowed to stand. (Br. for Appellees at 44, 50). The appellees' brief makes a number of assertions attempting to support this view.

First, the appellees note that when the three-judge court initially said the October 6 election could go forward, no immediate effort was made by the appellants to seek from this Court an injunction against the election. (Br. for Appellees at 44, 48). However, the September 28 order permitting the October 6 election specifically enjoined the winners from taking office pending final resolution of the issue by the district court, leaving open the distinct possibility that the election results would not be implemented. (J.S. App. 90a-91a). It would have been premature to seek extraordinary relief from this Court when the district court had yet to decide what to do. Once the district court decided to let the winners take office, appellants sought an injunction from this Court. Moreover, this Court never has required that an application for a stay or injunction be filed in order to preserve the right to seek the setting aside of illegal elections once the merits of the case are adjudicated. *See, NAACP v. Hampton County Election Commission*, 470 U.S. at 173, 182-183 (no pre-election stay or injunction was

sought from this Court, yet the Court ordered that the election be set aside if the Attorney General objected to the change).

The next contention from the appellees' brief is that "appellants have made no attempt in the three-judge court to unseat these judges." (Br. for Appellees at 44). Of course, the appellants attempted in the district court to keep the judges from taking their seats in the first place. Once the district court said the judges could hold the seats provisionally, there was nothing further for the appellants to do other than appeal to this Court. Thus, no bypass of available remedial alternatives occurred in the district court.[8]

The appellees cite this Court's statement in *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982), that the district courts often are in a better position than this Court to fashion relief. (Br. for appellees at 45-46). While that may be true as a general matter, this Court has not hesitated to give specific remedial instructions to the district courts in Section 5 cases where appropriate. Indeed, in *Hampton County*, this Court's most recent Section 5 case, the Court specifically instructed the district court to give the jurisdiction no more than 30 days to seek preclearance from the Attorney General and ordered the district court to set aside the elections if the Attorney General's approval is not forthcoming. Here, since the Attorney General's

[8] At pages 44-45, n. 41 of their brief, the appellees quote counsel for the appellants at a December 20, 1990 hearing before the single-judge court, Chief Judge John V. Parker. The hearing was called to consider the status of the pending constitutional claims before Judge Parker, and during the course of the hearing he asked about the status of the issues before the three-judge court. Appellants' counsel, in the quoted statement, simply told Judge Parker of the appellants' view that this Court's November 2, 1990 injunction did not specifically prohibit candidates elected on October 6 or candidates without opposition from taking office in the uncleared judgeships. The statement was not a waiver of the right to seek to have the elections set aside if the appellants prevail on appeal.

approval already has been denied, this Court can and should, at the very least, order the elections set aside in keeping with *Hampton County*.

Moreover, the district court already has indicated its chosen remedial path, saying it intends to keep the uncleared judgeships open until at least 150 days after the conclusion of the District of Columbia litigation, including the judgeships for which the November 6 elections were enjoined by this Court and which are now filled by incumbents or appointees. (See the January 11, 1991 order of the district court, J.A. 268). This open-ended continuation of the Section 5 violations is improper (see Br. for Appellants at 32-35), and this Court should impose a time limit rather than leaving to the district court a matter it already has decided.[9]

In their brief, the appellees quote *Perkins v. Matthews*, 400 U.S. at 396-397, to the effect that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." (Quoted in Br. for Appellees at 46). Here, of course, local officials have had an opportunity to seek federal approval, did so over three years ago, and the approval was denied. Even though the initial denial occurred nearly three years ago, the state defendants did not file a preclearance action in federal district court in the District of Columbia until three months ago, and then only under deadline from the federal district court in Louisiana. Thus, ample opportunity to seek federal ap-

[9] Even if the elections are set aside, permitting pre-election incumbents to hold office in the judgeships pending the resolution of the District of Columbia litigation will perpetuate the discrimination found by the Attorney General when he made his Section 5 objections. All of those incumbents were previously elected in uncleared election contests held pursuant to the same discriminatory at-large elections to which the Attorney General objected.

proval has existed, the required federal approval has not been forthcoming, and under *Perkins*, the elections should be set aside.

In both *Perkins* and in *Allen v. State Board of Elections*, cited by the appellees (Br. for Appellees at 46), local officials had yet to seek preclearance because of a dispute regarding the coverage of Section 5. In *Berry v. Doles*, 438 U.S. 190 (1978), also cited by the appellees (Br. for Appellees at 46-47), local officials had yet to seek preclearance and contended that the disputed 1976 elections at issue in that case had not been conducted pursuant to a voting change. 438 U.S. at 192. Those cases are far different from the present case, where preclearance was sought and the Attorney General objected some time ago.

Moreover, while this Court in *Berry* permitted the local jurisdiction to seek preclearance prior to the setting aside of any elections, the Court indicated that the preclearance would have to be sought and acted upon within a few months so the plaintiffs could obtain relief quickly. The *Berry* opinion was issued June 26, 1978, with the Court noting that the plaintiffs could, upon any denial of preclearance, seek relief with respect to the 1978 general election that would cure the defect from the disputed 1976 election. 438 U.S. at 193. That necessarily contemplated and required prompt action on the preclearance request in time for the fall, 1978 general election. By contrast, the appellees in the present case ask this Court to adopt the district court's timetable of waiting years for the litigation to conclude in federal court in the District of Columbia before any remedial action is taken. That is totally inconsistent with what the Court suggested in *Berry*.

In *Georgia v. United States*, 411 U.S. 526 (1973) cited by the appellees, (Br. for Appellees at 48), there was a serious dispute about Section 5's applicability and about

whether an objection had been timely interposed. 411 U.S. at 531. This Court, therefore, issued a stay permitting elections to go forward and then later, after ruling on the merits, declined to set the elections aside. By contrast, in the present case, Section 5 clearly is applicable and there is no claim that the Attorney General's response to the state's Section 5 submissions after this litigation started was untimely. The district court had no excuse for permitting the elections to go forward. Indeed, this Court did the exact opposite by enjoining the November 6 and December 8 elections for judgeships the district court conceded were uncleared. *Georgia v. United States* is not controlling.[10]

Next, the appellees argue the elections should not be set aside because, according to them, the law was unclear and with this Court's decision in *Brooks*, "a federal court held for the first time that the addition of judgeships was covered by Section 5." (Br. for appellees at 49). As mentioned earlier in this brief at page 14, that contention is incorrect. Moreover, any lack of clarity in the law is taken into account only as a justification for a jurisdiction's *failure to submit for clearance* voting changes about which there was some dispute as to Section 5's coverage. *Allen v. State Board of Elections*, 393 U.S. at 572; *Perkins v. Matthews*, 400 U.S. at 396. Here, the State of Louisiana submitted for clearance over three years ago most of the voting changes at issue. The state cannot now claim the elections should remain in place on the ground that it never sought clearance due to confusion in the law.

Finally, appellees contend no special elections can be held even if a time limit is imposed by this Court, because any elections held under what appellees call the

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[10] *Hampton County* is a much more recent case than *Georgia v. United States* and holds that elections must be set aside if the required federal approval is not forthcoming. 470 U.S. at 182-183.

"old system" would include those elements to which the Attorney General has objected. (Br. for Appellees at 49-50). However, the Louisiana legislature is free to adopt a new election plan in the districts at issue that deviates from the "old system" and cures the Section 5 objections, with elections to be held within any time limit imposed by this Court. In the absence of legislative action, the district court can consider in the first instance the feasibility of special elections within any time limit imposed by this Court. While such elections could not be held under what the appellees call the "old system" in the affected districts, federal courts have the authority to fashion *new* court-ordered election plans where necessary to insure compliance with Section 5. *Connor v. Waller*, 421 U.S. 656, 656-657 (1975); *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) (opinion of White, J.). Whether special elections are held or not, this Court should impose a time limit by which the illegal judgeships expire so the long-standing Section 5 violations in this case will not continue unabated.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the district court's decision should be reversed.

Respectfully submitted,

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No. 90-952

In the Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, ET AL., APPELLANTS

v.

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. Whether the district court erred in permitting elections to be conducted and the winners of those elections to be provisionally instated in office under changes in election procedure to which the Attorney General had objected under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the Attorney General's preclearance of legislation providing for changes affecting voting in certain districts served to preclear earlier-enacted legislation providing for other changes affecting voting in those districts.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case involves enforcement of the mandate of Section 5 of the Voting Rights Act of 1965 that covered jurisdictions refrain from implementing changes affecting voting "unless and until" those changes have been precleared. 42 U.S.C. 1973c. In addition, this case raises important questions concerning the procedures for submitting and preclearing changes. Under Section 5, the Attorney General is vested with responsibility to review election law changes submitted for administrative preclearance, as well as to initiate suits to prevent implementation of unprecleared changes. The Court's disposition of this case will affect the Attorney General's execution of these statutory duties.

On October 31, 1990, in response to this Court's request, the Solicitor General submitted a brief expressing the views of the United States on appellants' application for an injunction pending appeal. The brief generaliy supported the application, which this Court subsequently granted in part and denied in part. The United States also participated in this case as amicus curiae in the district court.

STATEMENT

1. In 1986, appellants filed a lawsuit challenging Louisiana's use of multimember and at-large voting schemes for elections for certain district (trial) and court of appeals judgeships under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Having uncovered evidence that the State had failed to obtain Section 5 preclearance for many changes affecting voting for judicial offices, appellants filed an amended complaint in 1987 to request that a three-judge court be convened under Section 5. Appellants asked that the court enjoin further use of the unprecleared changes.

2. During 1988 and 1989, the State attempted to obtain administrative preclearance of changes that appellants discovered had not been precleared, although many of those changes had been made by statutes enacted years earlier. By letters of September 23, 1988, May 12, 1989, and September 17, 1990, the Attorney General granted preclearance for some of those changes, but objected to others. See J.S. App. 108a-126a, 127a-135a, 136a-167a.

3. The State nonetheless proceeded with plans to hold elections for the seats as to which objections had been interposed; at the same time, the State took no steps to secure judicial preclearance pursuant to a Section 5 declaratory judgment action. Meanwhile, elections for some of

the unprecleared seats had been blocked by an injunction issued by the single-judge district court in the Section 2 case. On July 23, 1990, appellants moved the three-judge court to enjoin the State from holding elections for seats not blocked by the Section 2 injunction. The United States supported appellants' motion.

On September 28, 1990, the three-judge court denied appellants' motion. J.S. App. 90a. The court did, however, enjoin the winning candidates from taking office, pending further orders of the court. *Id.* at 91a. The first-round elections were to be held as originally scheduled on October 6, with any necessary runoff elections scheduled for November 6.[1]

4. Also on September 28, 1990, the Fifth Circuit, sitting en banc, ruled in *LULAC* v. *Clements*, 914 F.2d 620 (1990), cert. granted, No. 90-974 (Jan. 18, 1991),[2] that judges are not "representatives" for purposes of Section 2(b) of the Voting Rights Act, 42 U.S.C. 1973(b). See J.S. App. 82a-83a. The State immediately moved the single-judge district court to dissolve the injunction it had entered under Section 2. Because elections for the seats involved in the Section 2 case were now – for the first time – likely to be scheduled, appellants asked the three-judge district court on October 1, 1990, to enjoin unprecleared elections in districts subject to the Section 2 injunction.

5. On October 2, the single-judge district court dissolved its Section 2 injunction in light of the Fifth Circuit's decision in *LULAC*, ordering that elections for the dis-

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[1] Because Louisiana law imposes a majority-vote requirement for victory in an election (see La. Rev. Stat. §§ 18:401, 18:481 (West 1979)), two rounds of elections are often required.

[2] The United States is filing a brief amicus curiae in this Court supporting reversal in *LULAC*. The United States is also the petitioner in *United States* v. *Roemer*, cert. granted, No. 90-1032 (Jan. 18, 1990), in which related issues are raised. See n.28, *infra*.

tricts that had been subject to the injunction should proceed roughly one month later than originally scheduled. J.S. App. 81a-84a. The court set the first-round elections for November 6, with runoffs on December 8.

Also on October 2, the three-judge Section 5 court denied appellants' motion to enjoin the unprecleared elections that were now—with the lifting of the Section 2 injunction by the single-judge court—scheduled for November 6/December 8. J.S. App. 86a-87a. The court held, however—as it had in its September 28 order with respect to seats not covered by the Section 2 injunction—that the winners of the November 6/December 8 elections could not take office, pending further order of the court. *Id.* at 87a.

6. On October 6, 1990, elections for seats that had not been subject to the Section 2 injunction were held. See J.S. App. 31a-32a. Absentee voting for those seats had begun on September 24, 1990. *Id.* at 32a.

7. On October 22, 1990, the three-judge court issued yet another order. J.S. App. 68a-81a. That order divided the seats at issue in this case into two categories: those as to which the court determined that the Attorney General had interposed valid objections, and those that the court regarded as having been precleared in spite of the Attorney General's objections.

a. With respect to the first category seats (J.S. App. 72a-73a),[3] the court held again that the elections could proceed. However, the court also set forth a plan under which, if the State instituted a declaratory judgment action in the United States District Court for the District of Columbia within 90 days (*id.* at 74a-75a), the winning candidates for those seats could take office provisionally. If the State won its declaratory judgment action (or persuaded the Attorney General to withdraw his objections),

[3] One of the seats listed, Division D of District 34, has in fact been precleared, as recognized in this Court's order of November 5, 1990. 111 S. Ct. 399.

the provisionally instated candidates would remain in office. *Id.* at 75a-76a. If, however, the State failed to obtain preclearance through one of these avenues, the provisionally instated candidates would remain in office only for 150 days after final judgment in the declaratory judgment action. *Id.* at 76a-77a. Of course, the State retained the right to conduct new elections under any revised election plan for which it could obtain Section 5 preclearance. *Id.* at 75a-76a.

In an opinion issued on October 31 (J.S. App. 1a-56a), the court held that Section 5 applies to judicial elections (*id.* at 21a) and that "the state had to obtain preclearance for additional judicial positions in a district or circuit which had previously been precleared by the Attorney General." *Id.* at 21a-22a. Turning to the question of relief, the court recognized that "the state itself is responsible for the consequences of its failure to comply with Section 5." J.S. App. 36a. In the court's words, "[t]he State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act." *Id.* at 7a n.10. The court concluded, however, that the elections should be allowed to go forward, because "the potential harm to all of the citizens of Louisiana outweighs the potential harm, if any, of allowing the elections to continue, with the winning candidates being seated on a provisional basis." *Id.* at 36a-37a.

The court observed that several factors played an important role in reaching this conclusion. First, in the court's view, by October 22, the candidates for the seats in question had a reliance interest in the election going forward.[4] J.S. App. 32a, 35a. Second, the court was per-

[4] The candidates' reliance interest was based on the court's September 28 decision to permit the October 6/November 6 elections to go forward and the court's October 2 decision to permit the November 6/

suaded that appellants' requests for injunctions—made on July 23 and October 1—"came very close to the October 6 election day." *Id.* at 34a. By those dates, "qualifying for some of these judicial positions had begun." *Id.* at 31a-32a. Third, the court noted that the October 6 and November 6 dates coincided with national elections, a feature that was desirable "to ensure high voter participation." *Id.* at 33a.[5] Finally, the court noted that its scheme for provisional instatement of winning candidates in office would minimize the injury to the interests of appellants, while preventing possible challenges to the validity of criminal and civil judgments. *Id.* at 35a-37a.

b. The three-judge court ordered that elections could proceed as scheduled and that winning candidates could be sworn into office to serve regular terms for those seats—listed in Part I of its order (J.S. App. 70a-71a)—that the court acknowledged had been subject to Section 5 objections by the Attorney General, but which the court nonetheless determined had been effectively precleared when the Attorney General precleared later changes affecting the same districts. The court reasoned (*id.* at 27a):

> [T]he change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act.

Thus, the court held (J.S. App. 23a-24a):

> [W]hen the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district.

The court recognized that it had no power "to equitably preclear a statute" (J.S. App. 30a n.43), but found that the earlier enacted changes were submitted to the Attorney General "in an unambiguous manner," and approved by him. *Id.* at 28a.[6]

8. On October 29, 1990, appellants applied to this Court for an injunction to halt the upcoming elections for all seats involving changes to which the Attorney General objected. On October 31, the United States, responding to this Court's invitation, filed a memorandum in support of the application.

By orders of November 2 and November 5, 1990, this Court granted appellants' application in part, enjoining the State from holding elections in districts involving changes that the district court found subject to valid objections, pending disposition of this appeal. The Court denied appellants' application in all other respects, thus allowing elections to proceed for seats involving changes that the district court considered to have been precleared by the Attorney General's approval of later-enacted legislation. 111 S. Ct. 376, 399.

9. In January 1991, the State filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance for the changes that the district court found had not been precleared. That action is pending.

SUMMARY OF ARGUMENT

1. The district court in this case acknowledged that, at the time of its October 22 order, the State planned to go

December 8 elections to go forward, albeit with no instatement in office pending further order of the court. J.S. App. 31a-34a.

[5] The court also alluded to unspecified voter confusion that might be caused if the elections were stopped at such a late date. J.S. App. 33a.

[6] The district court later added an additional seat—District 20, Division B—to the list of precleared seats in Part I of its October 22 order. J.S. App. 53a.

forward with elections employing unprecleared changes in voting procedure. Nonetheless, under the guise of a remedial determination, the district court sanctioned what was in effect a violation of Section 5: the court permitted the State to hold the elections and permitted the winners to take office provisionally, pending the completion of what can reasonably be expected to be a lengthy Section 5 declaratory judgment action in the federal district court here in Washington.

The district court's decision not to enjoin the elections was wrong. Although a Section 5 district court retains significant remedial discretion, that discretion ought not extend to permitting an acknowledged Section 5 violation to proceed despite timely efforts to enjoin it. The district court's decision poses a threat to the general enforcement plan of Section 5, the purpose of which is to shift the advantages of time and inertia from the State to the Section 5 plaintiff. Moreover, because the elections took place despite the fact that the Attorney General had interposed Section 5 objections, the district court's decision also specifically threatens the integrity of Section 5's administrative preclearance mechanism. Finally, Section 5 mandates that unprecleared changes not have the force of law. The fact that the court's order permitted the winners only to take office provisionally (thereby giving effect to the unprecleared changes only for an interim—albeit lengthy—period) does not alter the conclusion that the order was improper.

2. The district court also decided that some of the changes at issue in this case had been precleared and that elections could proceed employing those changes, even though the Attorney General had specifically interposed objections to them. The district court held that the Attorney General had effectively precleared those changes when he precleared later changes affecting the same districts. In most instances of this type, the changes at issue

involved the addition of seats to be elected at-large in a given district. In some cases, other changes—such as the addition of designated posts or subdivision of districts—are involved.

The district court's decision conflicts with this Court's decision in *McCain* v. *Lybrand*, 465 U.S. 236 (1984), which elucidated the structure and operation of Section 5. As *McCain* made clear, the administrative preclearance process applies to *changes* affecting voting, and the Attorney General's decision not to object to a given submission thus applies only to the *changes* that are clearly and unambiguously identified in that submission. Prior, unprecleared changes affecting the same district, no matter how similar to the change identified in a given submission, are not automatically precleared when the Attorney General preclears that submission. Thus, when the Attorney General preclears a submitted change increasing the number of judgeships from 5 to 6, he preclears that *change* only; if the State neglected to submit a prior change increasing the number from 2 to 5, that prior change has not been precleared. The district court's holding to the contrary would require the Attorney General, before preclearing a given voting change, to investigate the history of all prior changes affecting that district. That would require a heroic effort; literally thousands of voting changes are submitted for preclearance each year, and thus the district court's holding would needlessly complicate the Attorney General's ability to carry out his Section 5 preclearance responsibilities.

ARGUMENT

A. THE DISTRICT COURT ERRED IN ALLOWING ELECTIONS INVOLVING VOTING CHANGES AS TO WHICH THE ATTORNEY GENERAL INTERPOSED CONCEDEDLY VALID OBJECTIONS TO GO FORWARD PROVISIONALLY [7]

As the three-judge district court recognized, its jurisdiction was limited to determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983). See J.S. App. 20a. With respect to the first two issues, the district court correctly determined that the changes affecting voting at issue were covered by Section 5 and had been the subject of objections interposed by the Attorney General.[8] The court erred, however, in deciding that an appropriate remedy was to permit elections to go forward and the winners to be seated provisionally.

1. The general mandate of Section 5 is that jurisdictions not implement voting changes "unless and until" they have been precleared. 42 U.S.C. 1973c. Under this mandate, changes affecting voting "are not now and will not be effective as laws until and unless cleared pursuant to § 5."

[7] Contrary to appellees' suggestion (Mot. to Dis. or Aff. 7-8), the district court's ruling permitting elections to go forward is not moot. Although the regular 1990 election season has passed, this Court's order of November 5, 1990, which by its own terms will remain in effect only until "the sending down of the judgment of this Court" (111 S. Ct. 400), is the only bar on the State's ability to schedule elections for the seats at issue in this appeal. See, *e.g.*, *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 115 n.13 (1981); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

[8] The Attorney General has delegated his Section 5 preclearance authority to the Assistant Attorney General, Civil Rights Division, 28 C.F.R. 51.3.

Connor v. *Waller*, 421 U.S. 656 (1975) (per curiam). Failure to obtain preclearance "renders the change unenforceable." *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 (1982).

If a Section 5 plaintiff establishes that a State has attempted to implement unprecleared changes affecting voting and seeks to enjoin the elections, the appropriate remedy is issuance of an injunction barring the State from holding elections under the unprecleared procedures. That, in our view, is the only remedy that complies with the statutory requirement that changes not be implemented "unless and until" precleared. In addition, that is the only remedy consistent with Section 5's purpose to shift the "advantage of time and inertia" (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966)) from the State to those seeking to enforce the statute. Thus, this Court has instructed Section 5 courts "to issue injunctions restraining the further enforcement of [unprecleared] enactments until such time as the States adequately demonstrate compliance with § 5." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 572 (1969).[9]

By contrast, the remedy adopted by the district court in this case—holding of elections followed by provisional seating of winners—permits the State to engage in a new violation of Section 5 and reap the fruits of that violation while a lengthy declaratory judgment action is filed and litigated through the district court and on appeal. The fact that the district court crafted this remedy in the exercise of its equitable powers does not make the district court's decision appropriate. As this Court recently reiterated, "courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of

[9] Accord *Perkins* v. *Matthews*, 400 U.S. 379, 397 (1971); *Hathorn*, 457 U.S. at 271; *Georgia* v. *United States*, 411 U.S. 526, 541 (1973); see also *Canady* v. *Lumberton City Bd. of Elections*, 454 U.S. 957 (1981) (granting injunction to prevent voting in upcoming election by residents of unprecleared annexed district).

law." *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893)). At least absent a showing by the defendant that the most extreme circumstances require a relaxation of the admittedly "unusual and severe" Section 5 remedy (*Morris* v. *Gressette*, 432 U.S 491, 501 (1977)), a Section 5 court may not permit illegal elections to go forward over a plaintiff's timely request for injunctive relief.

2. Although Section 5 plaintiffs who seek timely relief are ordinarily entitled to an injunction prohibiting the State from implementing unprecleared changes, appellants' claim for an injunction in this case was particularly strong because the changes at issue had all been the subject of Section 5 objections interposed by the Attorney General. Section 5 does not require a State to seek preclearance of voting changes from the Attorney General; the State can, instead, repair to the federal district court for a declaratory judgment. If, however, the State does seek to employ this "rapid method of rendering a new state election law enforceable" (*Allen*, 393 U.S. at 549),[10] it must recognize that the Attorney General's decision is final and binding (at least until the State has obtained a contrary ruling in a Section 5 declaratory judgment action). The Attorney General's decision not to object is the *only* means by which a State can enforce a voting change under Section 5 without resorting to a declaratory judgment action. Therefore, the Attorney General's interposition of an objection on the ground that he "is unable to determine that the change is free of discriminatory purpose and effect" (28 C.F.R. 51.52(c)) definitively precludes implementation of the voting change.

[10] See also *Morris* v. *Gressette*, 432 U.S. at 503-505 (administrative preclearance reflects congressional "desire to provide a speedy alternative method of compliance"); *Georgia* v. *United States*, 411 U.S. at 536-540 (60-day limit).

Congress reaffirmed this basic understanding when it extended the Voting Rights Act in 1982. At that time, Congress exhibited "virtual unanimity" on the need to extend the Section 5 enforcement scheme.[11] S. Rep. No. 417, 97th Cong., 2d Sess. 9 (1982). Referring to precisely the deficiencies that the State exhibited in this case, the Senate Committee Report explained:

> [D]isappointing gaps in compliance with Section 5 are significant evidence of the continuing need for the preclearance requirement. * * * At least as disturbing as * * * failures to preclear changes is the frequency with which jurisdictions refuse to comply with Section 5 after objections are entered. The law is unambiguous: a Section 5 objection is final and binding unless a contrary judgment is obtained from a three-judge court in the District of Columbia.

Id. at 12-13.[12]

3. The fact that the district court's remedy permitted only "provisional" instatement of the electoral winners pending filing and disposition of the State's declaratory judgment action does not make it any more consistent with Section 5's general prohibition of *any* implementation of unprecleared changes. To be sure, the district court rightly apprehended that, at the time of its October 22 order, the State still had available an avenue for obtaining preclearance—the filing of a declaratory judgment action in the District Court for the District of Columbia. More-

[11] Cf. *Georgia* v. *United States*, 411 U.S. at 533 (relying on Congress's five-year extension of Section 5 without change in 1970).

[12] The Committee Report cited two types of noncompliance, both of which are evident on the record of this case. "First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. Second, there continue to be instances of changes having been implemented despite a prior Department of Justice objection." S. Rep. No. 417, *supra*, at 12. See also *id.* at 47-48.

over, it is true that, if the State ultimately were successful in such an action, that success would obviate the need for the district court here to make some difficult determinations as to whether and how to permit the State to fill the large number of affected judicial seats. Nonetheless, the mandate of Section 5 is to deny legal effect to unprecleared voting changes. The fact that preclearance may ultimately be obtained provides no basis to permit the State to employ unprecleared changes – in short, to violate Section 5 – in the interim.

Indeed, this case vividly illustrated the threat to the Section 5 enforcement plan of permitting a State the opportunity to implement changes while a declaratory judgment action is filed and litigated. Most of the objections lodged by the Attorney General were embodied in letters dated September 23, 1988, and May 12, 1989.[13] See J.S. App. 108a-126a, 127a-135a. The State thereupon sat on its hands; it made no effort to obtain a declaratory judgment concerning the objected-to changes until January 18, 1991. Including any appellate review sought in this Court, two to three years could easily elapse before the recently filed declaratory judgment action reaches final judgment. If the judgment is ultimately that the changes have a discriminatory purpose or effect, the judges who were seated under the three-judge court's order will retain their seats for an additional 150 days. See J.S. App. 76a. Thus, conservatively calculated, the effect of the district court's action would be to permit the State to implement unprecleared voting changes for a period of four years or more after notice of the Attorney General's objections. That remarkable result flies in the face of Section 5's purpose to

[13] The September 17, 1990, letters (J.S. App. 136a-165a) declined to reverse the objections set out in the two earlier letters, as well as interposing objections to several later-enacted changes. Thus, the State has been on notice of the Attorney General's objections to the vast majority of the changes at issue here since 1988 or early 1989.

shift the advantages of time and inertia from the State to the Section 5 plaintiff.

4. None of the reasons advanced by the district court in its October 31 opinion are adequate to justify an exception to Section 5's rule prohibiting the holding of elections using unprecleared voting changes.

a. Contrary to the court's suggestion (J.S. App. 34a), appellants' motion to enjoin the elections appears to have been timely. By July 1987, appellants had filed an amended complaint putting the State on notice that it was using unprecleared voting changes, and appellants' July 23, 1990, motion to enjoin the elections was filed over two months prior to the October 6 date of the first-round elections. Nor was appellants' October 1 motion untimely, in light of the fact that the seats that were subject to that motion were still subject to the Section 2 injunction when the motion was filed. Consequently, no election was scheduled for those seats at the time the motion was filed; the November 6/December 8 election schedule for those seats was only set the following day, when the single-judge Section 2 court dissolved the Section 2 injunction. Only with the Fifth Circuit's en banc decision in *LULAC* and the State's consequent motion to lift the Section 2 injunction did the need for appellants' October 1 motion arise, and the motion was filed promptly after those developments.

b. The existence of unspecified "confusion" on the part of the voters could not justify the district court in permitting elections employing concededly invalid voting changes to go forward. As this Court has recognized, when elections of doubtful validity are held, "[p]otential candidates who considered the [elections] illegal * * * may have deliberately stayed away." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 167, 177 (1985). Far from counseling in favor of allowing elections to go forward, any "confusion" surrounding the unprecleared seats provided reason to postpone elections until valid procedures were in place.

c. Nor does the court's concern with preventing possible questioning of the validity of criminal and civil judgments (J.S. App. 37a) justify allowing invalidly elected candidates to assume office provisionally. Indeed, the provisional status of these judges—and the use of procedures that are invalid under federal law to elect them—might provide the very ammunition needed to challenge the legitimacy of their rulings. In any event, as we point out below, state law appears to recognize several means for filling judicial seats that may have become vacant if elections were enjoined. See note 26, *infra*.

d. The other reasons cited by the district court cannot justify its decision to sanction the State's prospective violations of Section 5. The desire to ensure "high voter participation" (J.S. App. 33a) does not provide a reason for allowing elections to proceed under invalid procedures. Nor does the fact that by October 22 candidates had expended time and expense in preparing for the elections (*id.* at 32a) alter the conclusion that the district court should have enjoined the elections. The candidates were on notice of the pendency of this action. At the time of the district court's October 22 order, the November 6/December 8 elections had only been scheduled since October 2, when the Section 2 court had lifted its injunction. And the three-judge court's own October 2 order specifically provided that winning candidates would *not* be permitted to take office "pending further orders of th[e] court." *Id.* at 87a.

5. The district court mistakenly believed that its decision to allow the State to give provisional effect to elections conducted under invalid procedures "closely parallels action taken in similar cases by the United States Supreme Court and other three-judge courts." J.S. App. 39a. In support of that conclusion, the district court cited *Hampton County*, 470 U.S. at 182-183, *Berry* v. *Doles*, 438 U.S. 190, 193 (1978), *Perkins* v. *Matthews*, 400 U.S. at 396-397, and *Georgia* v. *United States*, 411 U.S. at 541. None of

the cited authorities, however, supports the district court's decision.

a. With respect to *Hampton County*, *Berry* v. *Doles*, and *Perkins* v. *Matthews*, the district court ignored two (and with respect to *Hampton County*, three) crucial distinctions between the situation it faced in late October and the facts in those cases. First, in this case, the district court decided to permit the elections to be held and the winners installed in office while preclearance was sought; in *Hampton County*, *Berry*, and *Perkins*, the issue was whether to remove individuals who had already taken office while the State sought preclearance. Second, in this case, the State had sought and been denied administrative preclearance before the district court was asked to enjoin the elections; in *Hampton County*, *Berry*, and *Perkins*, the State had never sought administrative preclearance for the covered change. Finally, in this case, the district court postponed the remedy for a period that could easily last several years, while the State's declaratory judgment action is filed and litigated to final judgment; in *Hampton County* at least, the Court expressly held that the district court was to postpone the remedy to allow time for the State "to submit these changes *to the Attorney General* for approval." 470 U.S. at 182 (emphasis added).[14]

Hampton County, *Berry*, and *Perkins* thus establish that, where a Section 5 plaintiff seeks to set aside invalidly conducted elections, a brief postponement of that remedy may be appropriate so that the State can pursue the alternative, "rapid method of rendering a new state election law enforceable." *Allen* v. *Board of Elections*, 393 U.S. at

[14] In *Perkins*, the Court spoke of postponing the setting aside of invalid elections while the State sought "federal approval" (400 U.S. at 396), while in *Berry*, the Court referred to submission "to a forum designated by Congress" for "approval" (438 U.S. at 192-193). The Court thus did not distinguish between the administrative and judicial preclearance procedures created by Section 5.

549. If the Attorney General preclears the changes involved, the slight delay may avoid the disruption caused by removing an elected official from office, along with the cost and inconvenience of filling the office through some other means later. *Hampton County, Berry*, and *Perkins* do not in any way support the district court's decision to delay remedy of a Section 5 violation for years so that a State can make a *second* attempt at obtaining preclearance, this time through the declaratory judgment process.[15]

b. *Georgia* v. *United States*, also relied on by the district court (see J.S. App. 46a-48a), involved the redistricting of the entire Georgia state legislature. As in *Hampton County, Berry*, and *Perkins*, elections in *Georgia* had already been held when the Court reached the remedial issue; in *Georgia*, the elections were held pursuant to this Court's own action staying a district court injunction pending appeal. See 411 U.S. at 541. In a two-

[15] The district court also purported to rely on several district court cases. See J.S. App. 39a-47a. *Wilson* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 1299, 1303 (M.D. N.C. 1970), involved a district court's refusal to set aside the results of primary elections because the plaintiffs had failed to litigate their request for the injunction in a timely fashion. In *Moore* v. *Leflore County Bd. of Election Comm'rs*, 351 F. Supp. 848, 852-853 (N.D. Miss. 1971), the district court itself noted the "peculiar conditions" in which the court seated candidates provisionally because that was the only practicable method to fill the offices involved "for the period of time needed to arrange for the new election." See also *Edge* v. *Sumter County School Dist.*, 541 F. Supp. 55, 57 (M.D. Ga. 1981), aff'd, 456 U.S. 1002 (1982). In one case, *United States* v. *County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala.), aff'd, 430 U.S. 924 (1977), elections do appear to have proceeded and winners to have assumed office provisionally. The published opinion gives no indication that the validity of the remedy was at issue between the parties. Nor was this Court's affirmance a judgment on the merits of the remedy; the appeal was taken by the defendant, who did not raise any remedial issues.

sentence discussion of the appropriate remedy, the Court held that it would be "inequitable" to set aside the results of the offending elections and order new elections to be held. *Ibid.*

This Court's order in *Georgia* did not alter the status quo or permit a further violation of Section 5. By contrast, the district court's order here specifically permitted the State to alter the status quo by holding new elections and in effect sanctioned new violations of Section 5. *Georgia* thus did not in any sense authorize the district court to countermand Section 5's mandate that changes affecting voting are invalid "unless and until" precleared. Cf. *INS* v. *Pangilinan*, 486 U.S. 875 (1988).

c. Finally, the district court decision in *Brooks* v. *Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989), modified (May 29, 1990), aff'd, 111 S. Ct. 288 (1990), also provides no support for the district court's decision in this case. See J.S. App. 46a n.65. Although the district court in *Brooks* determined that the State had a compelling interest in filling the judicial seats at issue, the court did *not* fill those seats by permitting elections to go forward and provisionally seating the winners. Instead, the court in *Brooks* took remedial steps that should have been employed by the district court here: the court enjoined future elections, and allowed the State of Georgia to permit incumbents to remain in office beyond the expiration of their terms. Although that remedy permitted the State to continue to gain the benefit of its *past* violations of Section 5, it did not in effect permit the State to commit *new* violations. See pp. 28-29, *infra*.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT APPROVAL OF LATER AMENDMENTS SERVED TO PRECLEAR EARLIER VOTING CHANGES

In Part I of its October 22, 1990, order (J.S. App. 70a-71a), the district court held that the Attorney General's preclearance of changes affecting certain districts operated to preclear changes made by earlier statutes affecting those districts, even though those earlier changes had since been submitted for preclearance and had become the subject of objections.[16] In ruling that preclearance of later changes operates to preclear earlier changes that the State had not submitted for preclearance, the Court relied on legal assumptions that are inconsistent with *McCain* v. *Lybrand*, 465 U.S. 236 (1984). In addition, to the extent that the court made factual findings that the State submitted the changes at issue "in an unambiguous manner" (J.S. App. 28a), those findings lack support in the record and should be reversed as clearly erroneous.

1. *McCain* v. *Lybrand* concerned a 1966 South Carolina statute that created a new form of government for a particular county. The statute provided that candidates for the new three-member county council would be elected by all county voters in at-large elections, but candidates would be required to reside in and run from three residency districts. The State failed to submit the 1966 statute for preclearance, although the county regularly conducted elections under it. In 1971, the General Assembly amended

[16] Among the seats listed in Part I of the district court's order were five seats that the Attorney General has in fact precleared or that were enacted prior to the effective date of the Voting Rights Act: Divisions A, B, C, and D in District 17, and Division C in District 32. The court's order should be upheld with respect to those seats.

the 1966 Act to increase the number of residency districts and county council members from three to five. 465 U.S. at 240, 243. The State submitted the 1971 Act for preclearance, and the Attorney General, after requesting additional information – including a copy of the 1966 legislation – declined to interpose any objection "to the change in question." 465 U.S. at 241. In a subsequent Section 5 challenge to the State's implementation of the 1966 changes, the district court reasoned that preclearance of the 1971 amendment, which increased the number of seats on the council but otherwise reenacted the provisions of the 1966 Act unchanged, necessarily constituted approval of the 1966 changes as well. 465 U.S. at 242-243.

This Court reversed. 465 U.S. at 258. The Court explained that the submission procedures for administrative preclearance "should be carefully construed to protect the remedial aims of the Act." *Id.* at 257. Those aims "would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *Id.* at 249 (quoting *United States* v. *Board of Comm'rs*, 435 U.S. 110, 136 (1978). The Court reemphasized the well-settled principle that "the preclearance procedures mandated by § 5 of the Voting Rights Act focus entirely on *changes* in election practices." 465 U.S. at 251. Thus, "[a] request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones cannot be considered an adequate submission of the latter practices." *Id.* at 256-257.

The *McCain* rule – that submission of legislation constitutes only a submission of the identified changes in that legislation – is essential to preserve the Attorney General's ability to scrutinize all voting changes by covered jurisdic-

tions to ensure that they meet the substantive requirements of the Voting Rights Act.[17] As *McCain* explained:

> In evaluating the use of the alternative procedure of submitting proposed changes to the Attorney General, it must be remembered that § 5 "was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act."

Id. at 247 (quoting *Perkins* v. *Matthews*, 400 U.S. 379, 392 n.10 (1971)). The Attorney General receives thousands of requests for preclearance each year.[18] Each change must be subjected to analysis in light of the demographics, voting patterns, and other conditions in the locality to arrive at the often "difficult and complex" judgment as to the presence of a discriminatory purpose or effect. *Georgia* v. *United States*, 411 U.S. at 526. The Attorney

[17] In keeping with *McCain*, 465 U.S. at 257, which places the burden of defining the scope of the preclearance request on the submitting jurisdiction, the Attorney General's regulations require submitting authorities to identify the precise changes for which preclearance is sought, and to specify the preclearance status of prior practices. See 28 C.F.R. 51.27(c) (where scope of submitted change is not clear, jurisdiction must provide "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting"); *id.* at (p) (jurisdiction must provide "[a] statement that the prior practice has been precleared * * * or is not subject to the preclearance requirement"). Substantially the same instructions have been in effect as guidelines since 1971. See 36 Fed. Reg. 18,186 (1971).

[18] For example, in the years 1986-1990, the Attorney General had to review an average of over 17,000 changes each year encompassed in over 3,500 submissions under Section 5. Those numbers can be expected to increase in the next several years, as electoral changes are made in response to the 1990 census.

General lacks the resources to go further and research the history of each piece of submitted legislation, to ensure that all earlier unsubmitted changes affecting voting have been brought to light.

2. With scarcely a mention of *McCain* (see J.S. App. 30a n.43) and no mention of the applicable regulations, the district court held that the State's request for and receipt of preclearance of amending legislation also served to preclear prior changes in voting practices. The Court's reasoning directly contradicts the principles of *McCain*. Whereas this Court held that "sending * * * legislation to the Attorney General merely with a general request for preclearance * * * cannot be deemed a submission of changes made by previous legislation" (*McCain*, 465 U.S. at 256), the district court ruled that "[w]hen the Attorney General approves the amended portion, he not only approves the new act, but necessarily approves the older, reenacted part, which forms part of the new act" (J.S. App. 27a). The district court also reasoned that "when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district" (*id.* at 23a-24a). But the district court in *McCain* applied similar logic and this Court reversed, holding that the Attorney General's preclearance of an increase in the size of an elected body did not operate to preclear the earlier decision to elect a smaller body under the same voting scheme.[19]

[19] The State complains of the Attorney General's alleged "inconsistency" (Mot. to Dis. or Aff. 9, 11) in objecting to earlier-added seats while precleaving later seats in the same district. The merits of the Attorney General's objections are not at issue in a Section 5 "coverage" case; indeed, the Attorney General's decision whether to interpose an objection to a given change is unreviewable by *any* court. *Morris* v. *Gressette*, 432 U.S. 491 (1977); *United States* v. *Board of Supervisors*,

3. As an alternative basis for reversing the district court in *McCain,* 465 U.S. at 251-254, this Court evaluated the evidence, including the State's submission letter, the legislation submitted, and the correspondence from the Attorney General. The Court noted that "the structure and purpose of the preclearance requirement plainly counsel against resolving * * * ambiguities in favor of the submitting jurisdiction." *Id.* at 257. The Court concluded that "to the extent the judgment below may be interpreted as resting upon a factual finding that the Attorney General actually considered and approved the changes made by the 1966 Act in the course of the submission of the 1971 amendment, * * * we are 'left with the definite and firm conviction that a mistake has been committed,' and we thus overturn that finding as clearly erroneous." *Id.* at 257-258 (quoting *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). Similarly, the documents in this case make clear that the State did not unambiguously submit, and the Attorney General did not actually

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429 U.S. 642, 646 (1977) (per curiam). If a State disagrees with the Attorney General's determination, its recourse is a declaratory judgment action in the District Court for the District of Columbia. Consequently, any alleged inconsistency would be irrelevant in this case.

In any event, the mere fact that the Attorney General has objected to an earlier-added seat while preclearing later seats does not demonstrate a genuine inconsistency. Because the Attorney General must analyze each change for which preclearance is requested on the basis of the information available to him at the time the change is submitted, contrary conclusions regarding the addition of several successive seats in the same district may well reflect differences in the information submitted by the State on each occasion. Cf. *Hampton County,* 470 U.S. at 180. In addition, Section 5 mandates an inquiry into the "purpose" of a given change, as well as its "effect." The Attorney General may well correctly determine that a particular enactment was the product of a discriminatory purpose, while a later change affecting the same district was not.

approve, the changes that the district court found to have been precleared.[20]

a. A useful example is provided by two bills enacted by the Louisiana legislature in 1975, Acts No. 114 and 305. Act 114 added one seat to each of the three election districts in the First Circuit and one at-large seat to each of the Second and Third Circuits. Act 305 added designated posts in the First Circuit. Some years later, the State enacted another statute, Act No. 3 of 1981, and submitted it for review. Mot. to Dis. or Aff. App. 8-17.[21] The State's submission letter identified various voting changes, reciting that "prior law" provided for three seats to be elected from each district in the First Circuit, while "new law" would provide for four seats per district (*id.* at 10); "prior law" provided for one judge per election district and two at-large judges in the Second Circuit, while "new law" would provide for two judges in each district and would reduce the number of at-large seats to one (*id.* at 11);[22] and "*[p]rior law* provided for alphabetical division * * * within each district of the First Circuit," while "*[n]ew law* provides the same for all court of appeals circuits" (*id.* at 16). The State specifically represented that "prior practices" had been precleared. *Id.* at 17. On the basis of those representations, the Assistant Attorney General declined to interpose objections to "the changes in question." *Id.* at 18. When Acts No. 114 and 305 were finally submitted for

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[20] As an initial matter, it is difficult to determine what documents formed the basis of the district court's conclusion that the State had met its burden of showing prior preclearance, since the State put into evidence only a few of the relevant submission letters and responses from the Attorney General.

[21] Act No. 661 of 1980, also referred to in this submission letter, was superseded in its entirety by Act No. 3 of 1981.

[22] The State represented that there would be "no change" from "prior law" in the number or allocation of judges in the Third Circuit. *Id.* at 12.

preclearance in 1987, the Assistant Attorney General interposed objections to them. J.S. App. 126a.

The district court held that "when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits." The State's submissions, however, plainly did not "in some unambiguous * * * manner submit [the two 1975 statutes] to the Attorney General with a request for his consideration pursuant to the Act." *McCain*, 465 U.S. at 249. The State's explanation of "prior law" in its 1981 submission letter gave no indication that the institution of designated posts in the First Circuit, and the addition of various types of seats in the First, Second, and Third Circuits, had not been precleared. Compare *McCain*, 465 U.S. at 251 n.19, 253 n.23. Indeed, the State expressly represented to the contrary. Compare *McCain*, 465 U.S. at 253 n.23. Nor did the State's 1981 submission provide any information on the law existing prior to 1975. Compare *ibid.* In short, just as in *McCain*, the State's 1981 submission letter was reasonably understood to constitute a submission of Act 3, not its predecessors, and the Attorney General's determination not to object consequently applied only to Act 3.

b. Other changes that the district court held to be unambiguously submitted and precleared likewise were not submitted properly. In one case, the court found (J.S. App. 53a) that the Attorney General's statement that he would not consider a redistricting proposal in light of its defeat in a referendum served to preclear a later statute that created a multimember district by adding a second seat to the district.[23] Cf. 28 C.F.R. 51.22 ("with respect to

[23] See J.A. 118-119, 122-123 (State's submission of referendum on whether the Twentieth District should be split into two and Attorney General's response stating that he "will make no determination * * * since the proposition did not receive voter approval"). The Assistant Attorney General objected to Act 34 of 1981, which added a second seat to the district, by letter of September 23, 1988. J.S. App. 123a.

a change for which approval by referendum * * * is required, the Attorney General *may* make a determination concerning the change prior to such approval") (emphasis added).

The court also found (see J.S. App. 51a) that the Attorney General's decision not to interpose an objection "to the special election for the Tenth Judicial District" (J.A. 101) constituted approval of the redistricting proposal to be voted on at that election. Since the State's letter submitting the special election is not in the record, the district court apparently reached that conclusion without attempting to determine whether the State had unambiguously submitted the change to be voted on at the election (see 28 C.F.R. 51.22), as well as the holding of the election itself.[24] See 28 C.F.R. 51.17. In still other cases, the court assumed that the Attorney General precleared intermediate increases in the number of district court seats elected from multimember districts when he precleared later decisions opting to expand these districts further.[25] In none of those cases can it be concluded that the State's submission letter specified that the State was seeking preclearance of earlier changes, nor did the Attorney General's responses state that preclearance was being granted for such changes. The documentary evidence thus belies the district court's conclusions that those changes were unambiguously submitted and precleared.

[24] The Assistant Attorney General interposed an objection to the redistricting proposal by letter of September 23, 1988. J.S. App. 114a, 122a.

[25] See, *e.g.*, J.S. App. 121a (objection interposed to Act 117 of 1973, adding sixth seat to District One); J.A. 149 (preclearance of eighth seat); J.A. 108, 112, 115 (preclearance of increase from "8 to 9 judges," based on State's representation that "prior practices were precleared").

C. THE DISTRICT COURT SHOULD ADOPT A REMEDY THAT LEAST OFFENDS SECTION 5 AND HAS THE LEAST PROSPECTIVE EFFECT

Appellants urge that the results of elections that improperly went forward pursuant to unprecleared changes should be "set aside, and the case should be remanded to the district court for consideration of any further relief that may be necessary." J.S. 15. If the Court agrees that the district court erred in permitting elections in this case to proceed and the victors to be seated, certain general principles should guide the district court in crafting a remedy.

Where an election has been held employing voting changes that are invalid under Section 5, the election should generally be set aside pending the State's implementation of legally valid election processes, at least in the absence of a demonstration that the seats involved must be filled and that no alternative means of filling them is practicable. Thus, newly created judicial seats that were never filled prior to the invalid election—as is the case with some of the seats at issue here—ordinarily can be returned to their vacant status; it is unlikely that the State will be able to demonstrate a need to fill them immediately. Nonetheless, the State can be expected to make such a showing with respect to its longstanding judicial seats.

Where the State has made such a showing, the district court should use whatever practicable means least offend Section 5 and have least prospective effect to fill the seats in question. In this regard, permitting prior incumbents (*not* those judges who were newly elected and seated as a result of the lower court's order) to hold over in office may well be the preferable method.[26] Although the incumbents

[26] Louisiana by statute authorizes a public officer to "continue to discharge the duties of his office until his successor is inducted into office." La. Rev. Stat. Ann. § 42:2 (West 1990). See, *e.g.*, *Strawitz* v. *Town of Marksville*, 77 So. 2d 597 (La. Ct. App. 1955); Op. La. Att'y Gen. 87-814 (1987). Cf. *Chisom* .v *Roemer*, 853 F.2d 1186, 1191 (5th Cir. 1988). Another alternative may be appointment under Louisiana law by the state Supreme Court. See La. Const. Art. 5 § 22(B) (West 1977 & Supp. 1990). State law precludes such appointed judges from later running for office, thus limiting the prospective effect of this method of filling seats.

may also have been elected under invalid procedures, the remedy puts the State's continued use of those procedures to a stop and thus minimizes the statutory violation. In addition, this method does not create new incumbents, and is therefore likely to have the least prospective effect when new, legally valid elections ultimately are held.[27]

CONCLUSION

The district court's order permitting elections to be held under voting changes to which the Attorney General has objected should be reversed and remanded with instructions to enter an injunction barring future elections "unless and until" preclearance is obtained.[28] The district

[27] Appellees' contention that "the United States Attorney General has taken the position that [judges elected pursuant to the district court's order] should be permitted to take office on a provisional basis" is mistaken. See Mot. to Dis. or Aff. 25. In support of their contention, appellees quote a sentence out of context from a district court filing (J.A. 259-267) by the United States addressing remedial matters. The filing was dated January 4, 1991, and referred to the situation created by the district court's order permitting elections to go forward and provisionally seating the victors; it did not address the validity of that order. If read in context, the passage quoted by appellees—"incumbents elected prior to the 1990 election cycle should [not] be treated differently from those judges elected as a result of the October 1990 elections" (Mot. to Dis. or Aff. 25)—urged the court to permit prior incumbents to hold over. It did not suggest or endorse the district court's decision to permit those elected in October 1990 to take office on a provisional basis.

[28] On January 18, 1991, this Court also granted certiorari in *Chisom* v. *Roemer*, No. 90-757 (consolidated with *United States* v. *Roemer*,

court's ruling that changes affecting voting had been precleared for the seats listed in Part I of its October 22, 1990, order also should be reversed.[29]

Respectfully submitted.

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MARCH 1991

No. 90-1032) and *Houston Lawyers' Ass'n* v. *The Attorney General of Texas*, No. 90-813 (consolidated with *LULAC* v. *The Attorney General of Texas*, No. 90-974). Those cases involve the application *vel non* of the results test of Section 2(b) of the Voting Rights Act to elected judges. The statutory term that creates the Section 2(b) issue—"representatives"—does not appear in Section 5. Cf. *LULAC*, 914 F.2d at 629. Therefore, this Court's decisions in *Chisom* and *LULAC* are unlikely to affect the issues in this case. The Court's decisions may, however, bear on the validity of some of the objections interposed by the Attorney General to voting changes at issue in this case. Cf. 28 C.F.R. 51.55(b)(2). Insofar as the Court's decisions do so, that effect may be raised either before the Attorney General in a request for reconsideration or in the pending Section 5 declaratory judgment action.

[29] The court's order should be affirmed with respect to Division D of District 34; Divisions A, B, C, and D in District 17; and Division C in District 32. See notes 3, 16, *supra*.

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No. 90-952

In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, et al.,

Appellants,

vs.

CHARLES "BUDDY" ROEMER, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide membership organization with over 275,000 members. It has a longstanding concern with promoting equality of the franchise, both through the fourteenth and fifteenth amendments, and through federal statutory guarantees such as Sections 2 and 5 of the Voting Rights Act of 1965. Indeed, the ACLU was actively involved in the effort to convince Congress in 1982 to extend the Voting Rights Act, and to adopt the "results" test as the standard for proving vote dilution.

The ACLU has maintained a Southern Regional Office since 1965 which operates a Voting Rights Project. The project has four staff lawyers whose primary area of practice is voting rights. Attorneys for the ACLU have handled numerous voting rights cases in the past twenty-five years, including *Rogers v. Lodge*, 458 U.S. 613 (1982) and *McCain v. Lybrand*, 465 U.S. 236 (1984). Much of that litigation was and continues to be brought in states which are covered, in whole or part, by the preclearance requirements of Section 5 of the Voting Rights Act, including Georgia, North Carolina, South Carolina and Virginia.

As an organization which has dedicated considerable resources to the enforcement of the Voting Rights Act, particularly in the Southern United States, ACLU has a distinct and cognizable interest in prompt and effective judicial enforcement of Section 5.

More specifically, the ACLU has a direct interest in having this Court more clearly delineate the remedy to be imposed upon jurisdictions which continue to implement

unprecleared changes after a substantive objection by the Attorney General. As lawyers for litigants under Section 5 of the Voting Rights Act, and most recently as attorneys for plaintiffs in *Brooks v. Georgia State Board of Elections*, ___ U.S. ___, 111 S.Ct. 288 (1990), the ACLU is continually faced with the question of the appropriate remedy – beyond a mere prospective injunction – for violations of Section 5. This case squarely presents a history of both non-compliance by the state and woefully inadequate enforcement by the district court. An opinion by this Court discussing these remedial issues would be beneficial to the litigants, and *amici* believe that their experience would be beneficial to the Court.[1]

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the constitutional and civil rights of Hispanics living in the United States. Protective of all rights of course is the fundamental right to vote.

[1] Plaintiffs raised similar remedial issues in their cross-appeal in *Brooks v. Georgia State Board of Elections*, No. 90-272 However, this Court summarily affirmed. 111 S.Ct. 288 (1990). The instant case provides the Court an opportunity to consider the question in a plenary fashion. The district court here adopted that part of the *Brooks* remedial order which permitted the judges sitting in objected-to judicial positions to continue to serve during the pendency of a declaratory judgment action in the United States District Court for the District of Columbia, and to remain in office even if the state is again denied preclearance "for 150 days after the finality of judgment in that case." J.S. App. 74a-77a.

MALDEF and its attorneys have engaged in substantial litigation to protect the right of Hispanics to an undiluted vote as guaranteed by the Fourteenth Amendment, *Wise v. Lipscomb*, 437 U.S. 535 (1978), *see also Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 59 U.S.L.W. 3461 (U.S. Jan. 7, 1991); as guaranteed by § 2 of the Voting Rights Act, *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534 (1989); and as guaranteed by § 5 of the Voting Rights Act, *City of Lockhart v. United States*, 460 U.S. 125 (1983).

As an organization which has devoted considerable resources to the protection of the fundamental right to vote, MALDEF has a considerable interest in this case.

Appellants and appellees have both consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The State of Louisiana, in implementing covered changes without first obtaining preclearance as required by Section 5 of the Voting Rights Act, clearly and deliberately "flouted the law." By refusing to enjoin further elections of those unprecleared statutes, despite a substantive objection by the Attorney General, the district court sanctioned that defiance, in disregard of both the decisions of this Court and the intent of Congress. Its order seriously undermined the remedial goals of Section 5, and must be reversed.

The district court also disregarded settled law in holding that more than 30 covered changes had been "retroactively precleared." Both the Section 5 regulations and the decisions of this Court make it clear that the state must independently and unambiguously submit each covered change, and assume the burden of proving that the change has neither a discriminatory purpose nor result. Here, once the changes were submitted, the Attorney General entered an objection on the merits. The court's finding that preclearance of subsequently enacted legislation automatically precleared the earlier changes, despite the Attorney General's finding to the contrary, failed to accord the proper deference to his construction of the Act, and improperly nullified his objection.

A denial of preclearance is a watershed point in Section 5 jurisprudence, and requires the imposition of affirmative relief. Unlike a failure to submit a change for preclearance, a substantive objection is a finding that the jurisdiction has failed to prove that the proposed changes have no racially discriminatory intent or effect. A district court has an obligation to enforce that objection to the same extent and on the same terms as an objection by the United States District Court for the District of Columbia.

Failure to obtain preclearance renders the changes null and void, and requires that the judicial positions be dismantled and the incumbents removed. Where, as here, preclearance has been sought and denied, there is no justification for any further delay in imposing that remedy. The addition of judgeships is clearly a covered change, and the commands of Section 5 are unequivocal. Any lesser remedy would remove any incentive for a

jurisdiction to *preclear* covered changes, and pave the way for further defiance.

On remand, the district court is free to consider whatever disruption might result, and to order interim relief as needed, including an election plan which cures the Attorney General's objection and allows the judgeships to be filled in accordance with the requirements of the Voting Rights Act.

ARGUMENT

I. UNPRECLEARED CHANGES ARE NULL AND VOID AND MUST CONSISTENTLY BE ENJOINED TO ENSURE CONTINUED COMPLIANCE WITH SECTION 5

The order of the district court allowing elections to go forward pursuant to statutes which are subject to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and which had been objected to by the Attorney General, was in clear violation of the decisions of this Court and the intent of Congress. The most fundamental tenet of Section 5 is the requirement that every change in an election standard, practice or procedure in a covered jurisdiction must be submitted for and receive preclearance, either from the Attorney General or the United States District Court for the District of Columbia, *prior to its implementation*. Statutes that are subject to Section 5 are not "effective as laws until and unless [they are] cleared" by federal authorities. *McCain v. Lybrand*, 465 U.S. 236, 245

(1984), citing *Connor v. Waller,* 421 U.S. 656 (1975)(per curiam).

Section 5 of the Voting Rights Act was enacted in response to the "unremitting and ingenious defiance" by states of the command of the Fifteenth Amendment. *South Carolina v. Katzenbach,* 383 U.S. 301, 309 (1966). Finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits," Congress exercised its constitutional authority to "prescribe[] remedies for voting discrimination which go into effect without any need for prior adjudication." *Id.*, at 327-28.

The most stringent of these remedies is the preclearance requirement of Section 5. It prevents any "covered jurisdiction," *i.e.* a jurisdiction which has engaged in certain violations of the Fifteenth Amendment, from implementing any election practice different from those in effect on the date of its coverage under Section 5 until it has first demonstrated, to the satisfaction of either the Attorney General or the United States District Court for the District of Columbia, that the proposed change has no racially discriminatory purpose or effect.

Because of the "acknowledged . . . inability of the Justice Department – given limited resources – to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," *Perkins v. Matthews,* 400 U.S. 379, 392, n. 10 (1971), voluntary compliance with the preclearance provisions is key to its operation as an effective protection of minority

voting rights. As Congress noted in extending the Voting Rights Act in 1982:

> Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law. The Supreme Court has recognized that enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 47 (1982).

In practice, however, covered jurisdictions have frequently ignored the requirements of Section 5. In a report issued in 1978, the Comptroller General of the United States found that literally hundreds of voting changes had been implemented in Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia without submission or compliance with the statute, and called for the strengthening of preclearance enforcement. Comptroller General of the United States, *Voting Rights Act – Enforcement Needs Strengthening* 13 (1978). Testimony before the house and senate in 1981 and 1982 revealed continuing and widespread non-compliance with Section 5, which was cited by Congress as a principal reason for its decision to extend Section 5 for an additional twenty-five years. S. Rep. No. 97-417, *supra,* at 12-5. According to the Senate report:

> The extent of non-submission documented in both the House hearings and those of this [Senate] committee remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, when sued or threatened with suit.

> Simply put, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

S. Rep. No. 97-417, *supra*, at 47-48, cited in *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175 n. 19 (1985). For a further discussion of the extent of non-compliance with Section 5, *see* U.S. Comm'n on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 64-75 (1981); L. McDonald, "The 1982 Extension of Section 5 of the Voting Rights Act: The Continued Need for Preclearance," 51 *Tenn.L.Rev.* 1, 62-80 (1983).

In the instant case, the State of Louisiana clearly and deliberately "flouted the law." Although the state sometimes sought preclearance of newly enacted judgeships for the district courts and courts of appeals, it failed to do so in each of the instances at issue here until 1987, after the commencement of this litigation. The District Court expressly found that:

> The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act.

J.S. App. 7a. The court went on to note that this was not "the first time a three-judge court in the Middle District of Louisiana was confronted with the problem of hearing a suit seeking to enjoin an election because of the state's failure to obtain preclearance . . . "

Because voluntary compliance has been subjected to such widespread abuse, and in order to ensure effective enforcement of protected voting rights, Congress and this Court have insisted again and again that a trial court

must, when presented with a violation of Section 5, take swift and decisive action. If the jurisdiction and the voting practice in question are covered by Section 5 and if there has been no preclearance, it is the duty of the district court to enjoin any implementation of the change. *McCain v. Lybrand, supra; Georgia v. United States*, 411 U.S. 526, 541 (1973); *Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). Unprecleared voting changes are null and void, and may not be enforced. *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982); *Perkins v. Matthews, supra; Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969). *Also see, Georgia State Board of Elections v. Brooks*, ___ U.S. ___, 111 S.Ct. 288 (1990), affirming the decision of a three-judge court enjoining further elections for unprecleared judgeships in Georgia.

The district court attempted to excuse its departure from settled precedent by arguing that it had equitable power to suspend the operation of Section 5 and to allow the people elected to serve on a "provisional" basis. J.S.App. 48a-49a. The decisions relied upon by the district court simply do not support its argument.

None of the decisions of this Court cited by the court below involved voting changes that were admittedly subject to Section 5 and which had actually been objected to by the Attorney General, as in the instant case. *Perkins v. Matthews, supra, Berry v. Doles*, 438 U.S. 190 (1978), and *NAACP v. Hampton County Election Commission, supra*, each involved changes that had been implemented without ever having been submitted to, or objected to, by either the Attorney General or the federal court. There is, therefore, nothing in any of those cases that justifies the

extraordinary action of the district court in this case of allowing the further implementation of voting changes that have actually been objected to by the Attorney General. *See also* discussion at pages 17-18, *infra*.

The court below also erred in claiming that the Supreme Court "approved an order very similar to that issued by this court" in *United States v. County Commission, Hale County, Alabama*, 425 F.Supp. 433, 436 (S.D.Ala.), *aff'd mem.*, 430 U.S. 924 (1977). To the contrary, the questions presented to this Court in *Hale County* involved only coverage, and not the remedial provisions cited by the court below. Specifically, the questions presented in the Jurisdictional Statement were limited to: "(1) Do provisions of Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973b, 1973c apply to Hale County, Alabama? (2) Have Attorney General of United States and Director of Census made such certifications and determinations as are required by 42 U.S.C. § 1973b(b) to effectuate applicability of provisions of 42 U.S.C. § 1973c to Hale County, Alabama?" *County Commission, Hale County, Ala. v. United States*, No. 76-772, 45 U.S.L.W. 3439 (Dec. 7, 1976).

Moreover, *Hale County* was decided prior to *Berry v. Doles, supra*, and *NAACP v. Hampton County Election Commission, supra*. In addition, certain of the voting changes in *Hale County*, unlike in the present case, were still being evaluated by the Attorney General for preclearance at the time the three-judge court entered its order. *United States v. County Commission, Hale County, Alabama, supra*, 425 F.Supp. at 436. Whatever basis there may have been for a "provisional" remedy in *Hale County* are absent in this case.

In *Georgia v. United States*, 411 U.S. 526 (1973), also relied upon by the lower court, J.S.App. 46a, this Court stayed enforcement of an injunction issued by a three-judge court against use of an unprecleared house reapportionment plan pending resolution on appeal of the then undecided issue whether state reapportionment was subject to Section 5, and whether the Attorney General had interposed an objection in a timely manner. *Id.* at 531. In resolving the case on the merits, this Court found the change was covered, affirmed the injunction issued by the three-judge court, and enjoined "any future elections" under the plan absent compliance with Section 5. *Id.* at 514. In the present case, there are no questions of first impression involving the coverage of Section 5 or the timeliness of the Attorney General's objection. Thus, *Georgia v. United States* provides no basis for the action of the court below in allowing the objected-to elections to go forward.

The district court's reliance on *Oden v. Brittain*, 396 U.S. 1210 (1969)(Black, J. in chambers) is also misplaced. In *Oden*, Justice Black explained his refusal to issue an injunction against interim use of an unprecleared increase in the size of the Anniston, Alabama City Council by citing his own *dissenting opinion* in *South Carolina v. Katzenbach, supra*, 383 U.S. at 355-362, for the proposition that "intervention" by the federal government in state and local electoral affairs under Section 5 was "unwarranted," 396 U.S. at 1211. Given the existing body of Section 5 law, Justice Black's in chambers opinion in *Oden* can hardly be deemed controlling or persuasive. In addition, Justice Black denied the injunction, despite the fact that he believed there was "considerable support" for the

applicants' position, 396 U.S. at 1211, because applicants had not shown that the possibility of obtaining a hearing below had been exhausted and he therefore doubted that he had the authority to grant the relief requested. *Id.* at 1212.

Scaggs v. Larsen, 396 U.S. 1206 (1969), another decision relied upon by the court below, J.S.App. 40a n.55, has nothing whatever to do with Section 5 or voting rights, and it is not apparent how the opinion is relevant to any issue presented in this litigation. *Moore v. Leflore County Board of Election Commissioners*, 351 F.Supp. 848, 850 (N.D.Miss. 1971), and *Wilson v. North Carolina State Board of Elections*, 317 F.Supp. 1299, 1301 (M.D.N.C. 1970), cited at J.S.App. 46a, involved voting changes which had neither been submitted for preclearance nor objected to under Section 5. They are therefore not applicable to the facts and issues in the present case.

The present case is not one in which the preclearance issue is of first impression or in which the objectionable nature of the change is in the slightest doubt. This Court has held that the changes in question are subject to Section 5, *see Brooks, supra*, while the Attorney General has objected to *these very changes*. One would be hard-pressed to find a case in which the decision of the three-judge court permitting the election of unprecleared judgeships to proceed was more inconsistent with settled law and the basic purposes of the Voting Rights Act.

In refusing to enjoin the elections for unprecleared judicial positions in this case, the district court disregarded overwhelming precedent and seriously undermined the remedial goals of Section 5. Its orders sanction

the state's continuing violation of Section 5 and should be reversed.

II. CHANGES SUBJECT TO SECTION 5 MUST BE INDEPENDENTLY SUBMITTED; THERE IS NO SUCH THING AS "RETROACTIVE PRECLEARANCE"

The district court unilaterally exempted from preclearance more than 30 covered election changes to which the Attorney General had objected on the ground that the changes were retroactively precleared by subsequent Section 5 submissions. In so doing, it not only disregarded well-settled law, but also nullified the preclearance determination of the Attorney General, a decision over which it had no lawful authority.

In order to obtain preclearance of a covered change, the jurisdiction must formally submit the change in the form required by 28 C.F.R. § 51.27, and assume the statutory burden of proving that the change has neither a discriminatory purpose nor effect. 42 U.S.C. § 1973c. The state did neither until 1987 when it submitted the changes to the Attorney General in conjunction with this litigation.

It is well-settled that in order to satisfy the requirements of Section 5, a change must be submitted "in some unambiguous and recordable manner." *Allen*, 393 U.S. at 571. *See also McCain v. Lybrand*, 465 U.S. 236 (1984); *United States v. Sheffield Board of Commissioners*, 435 U.S. 110 (1978). State officials have independent submission burdens respecting each covered change. As this Court

explained, in reversing a district court finding of "retroactive preclearance" in *NAACP v. Hampton County Election Commission*:

> A change that was never submitted at all does not meet this standard.

470 U.S. at 182.

Nor does the submission of *subsequently* enacted legislation bring the *prior* change before the Attorney General for review:

> When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to § 5 preclearance.

McCain v. Lybrand, 465 U.S. at 256-57.[2] *See also Haith v. Martin*, 618 FSupp. 410, 413 (E.D.N.C. 1985), summarily aff'd, 477 U.S. 901 (1986), rejecting argument that certain session laws creating new elected judgeships in North Carolina were "precleared by inclusion" in later enactments of the General Assembly.

[2] In this case, as in *McCain*, it is undisputed that:

(1) the jurisdiction is subject to Section 5;

(2) the changes at issue are subject to the preclearance requirement; and

(3) the changes were never submitted for preclearance at the time of their enactment. 465 U.S. at 250.

The policy reasons for such a rule are readily apparent. The Attorney General has limited resources, and cannot monitor changes never brought to his attention. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States v. Sheffield Board of Commissioners, supra*, 435 U.S. at 136. To permit the submission of a subsequent change to preclear an earlier, unsubmitted change would allow "circumvention of the requirement which itself was designed to eliminate circumvention of the goals of the Act. H.R. Rep. 97-227 [97th Cong., 1st Sess.] p. 13 (1981)." *McCain*, at 249.

Here, the changes, some of which were enacted as long ago as 1968, were not submitted for preclearance until after plaintiffs moved to amend the complaint to add Section 5 violations in 1987. Once the changes were submitted, the Attorney General objected on the merits. The State of Louisiana twice sought reconsideration, and the Attorney General twice reiterated his objection, on September 17, 1990 and October 9, 1990. Nevertheless, the district court, by order of October 22, 1990, held that the statutes had been previously precleared by virtue of the preclearance of subsequently enacted legislation. By so doing, it erred as a matter of law.

The district court not only failed to follow the holding of *McCain*, but in refusing to enjoin the changes on the grounds that they had already been precleared, it wholly disregarded and nullified the Attorney General's finding that the statutes had *not* been precleared, and

were objectionable because they have a racially discriminatory effect. As this Court has repeatedly reiterated, the Attorney General's construction of the Act, and of the scope of its own objections, is entitled to "considerable deference." *NAACP v. Hampton County Election Commission*, at 179. This Court has at least twice previously relied upon statements by the Justice Department in determining whether a change has been precleared. *McCain v. Lybrand*, 465 U.S. at 255-56; *United States v. Georgia*, Civ. Action No. C76-1531A (N.D. Ga., Sept. 30, 1977), *summarily aff'd*, 436 U.S. 941 (1978). The district court erred in failing to give the necessary deference to the coverage determination of the Attorney General and in considering *de novo* whether preclearance had been obtained.

III. ONCE AN OBJECTION HAS BEEN ENTERED, COURTS MUST ORDER AFFIRMATIVE RELIEF, AND REQUIRE THE JURISDICTION TO DISMANTLE ALL VOTING CHANGES IMPLEMENTED IN VIOLATION OF § 5

This Court has had frequent occasion to delineate the appropriate remedy in cases where an unsubmitted or objected-to change is about to be, but has not yet been, enforced: the change may not be implemented until preclearance is obtained. *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *United States v. Board of Supervisors of Warren Co., Miss.*, 429 U.S. 642, 645 (1977). Where the district court has failed to enjoin illegal implementation, this Court has as a matter of course granted applications for a stay. *See, e.g., Holt v. City of Richmond*, 406 U.S. 903 (1972); *Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981); *Lucas v. Townsend*, 486 U.S. 1301 (1988).

Similarly, this Court has on several occasions considered the appropriate remedy in cases where the jurisdiction has implemented a covered change without first seeking preclearance under Section 5. While acknowledging that an unprecleared change is legally unenforceable, this Court has authorized district courts, in formulating relief, to examine the reasons why no preclearance was sought, as well as the need for an order reinstating the *status quo ante*.[3] So, for example, where it was not "reasonably clear at the time of [implementation] that the changes were covered by Section 5," *Perkins v. Matthews*, 400 U.S. 379, 396 (1971), this Court has indicated that it might be appropriate to allow the covered jurisdiction thirty (30) days within which to apply for preclearance before imposing affirmative relief. *See, e.g., Berry v. Doles*, 438 U.S. 190, 192-93 (1978); *N.A.A.C.P. v. Hampton County Election Commission, supra*, 470 U.S. at 182.

What this Court has not yet had occasion to consider – and what is squarely presented by this case – is the remedy required when a change has been illegally implemented and an objection has been entered by the

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[3] Invalidating the unprecleared change automatically reinstates the "last valid plan in effect." *Edge v. Sumter County*, 775 F.2d 1509 (11th Cir. 1985), citing *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and *Perkins v. Matthews*, 400 U.S. 379-383-85 (1971). The "last valid plan in effect" here is the judicial system as it existed on November 1, 1964, with such changes as have subsequently been precleared. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Attorney General.[4] In this case, preclearance was twice sought and twice denied *before the district court entered its final remedial order. Amici* submit that these facts render the instant case quite different from preceding cases and require additional, affirmative relief.

A denial of preclearance, whether by the Attorney General or the United States District Court for the District of Columbia, is not merely another fact to be considered; it is watershed point in Section 5 jurisprudence. Unlike a failure to submit a change for preclearance, the Attorney General's decision denying preclearance is a substantive finding that the jurisdiction has failed to carry its burden of proving that the proposed change has neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 441 U.S. 526 (1973). Whatever the propriety of weighing factors such as disruption or confusion in determining whether to enjoin an unprecleared change *prior* to federal review,[5] such considerations have

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[4] In each of the cases previously addressed by this Court in which an unprecleared change had already been implemented, no objection had yet been entered. In *Perkins, Berry* and *Hampton*, for example, no preclearance had yet been sought. In *Lucas v. Townsend*, preclearance was pending at the time the stay was requested, but no determination had yet been made.

[5] *Amici* would argue that "disruption" has no place in the remedial calculus even where preclearance has *not* yet been sought. Neither *Perkins* nor *Hampton* include disruption among the relevant factors to be considered. Further, the district court in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (3 judge), summarily aff'd, 477 U.S. 901 (1986), in an opinion entered and affirmed by this Court *after* both *Perkins* and *Hampton* were

(Continued on following page)

no place once the change is submitted and a substantive objection entered.[6] To permit a change which has an adverse racial purpose or effect to remain in effect would nullify the entire Section 5 process.

Here the district court allowed Louisiana, which implemented judicial election statutes without preclearance *knowing* that preclearance was required, to proceed with elections as to the unprecleared posts *despite an objection on the merits by the Attorney General*. It further permitted the judges thereby elected to take and remain

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decided, refused to limit its remedy to prospective relief despite what it found to be "great efforts . . . by the Executive Secretary of the [N.C.] State Board of Elections to comply with the requirements of the Voting Rights Act of 1965," on the grounds that

> *the Act does not give this Court power to provide equitable relief* to Defendants, no matter how just their cause.

Haith, supra, at 414.

[6] The district court's balancing scheme (J.S.App. 31a-39a) and analogies to "action taken in similar cases by the United States Supreme Court and other three-judge courts" (J.S.App. 39a-49a) wholly ignore the one dispositive fact in this case: the Attorney General's objection under Section 5 of the Voting Rights Act.

Moreover, part of the "balancing" in which the court engaged has absolutely *no* place in Section 5 jurisprudence. If a state has failed to seek or obtain preclearance, it has forfeited any cognizable interest "in managing [its] own affairs consistent with the Constitution . . . " (J.S.App. 36a), and there is no authority which permits a district court to weight such an interest against "the rights of the plaintiffs under the Voting Rights Act of 1965," let alone to give that interest *dispositive* weight.

in office while the state pursues *judicial* preclearance, by filing and litigating an action for declaratory judgment in the District Court for the District of Columbia. In so doing, it not only rewarded the state for illegally implementing the changes, it also rendered the Attorney General's findings – and thereby the preclearance requirement itself – of no legal effect.[7]

Contrary to the implicit view of the district court, an objection by the Attorney General is not just another "step in the preclearance process." An objection by the Attorney General stands on equal footing with a preclearance decision by the United States District Court for the District of Columbia. Administrative preclearance is an *alternative* forum, enacted by Congress to provide jurisdictions with a more expeditious route for preclearance than litigation, not a "less valid" one. S. Rep. No. 97-417, *supra*, at 13. There is no "preclearance hierarchy," such as that created here by the district court. The district court was under an obligation to enforce the Attorney General's Section 5 objection to the same extent and on the same terms as an objection by the United

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[7] Neither the district court nor this Court on appellate review has the authority to second-guess the Attorney General's substantive determination on preclearance. The only questions within the authority of the three-judge court in a Section 5 proceeding are:

(a) whether the jurisdiction is covered;

(b) whether the change is one affecting voting; and

(c) whether there has been preclearance.

Perkins v. Matthews, 400 U.S. 379, 383-85 (1971); *United States v. Board of Supervisors of Warren County, Miss*, 429 U.S. at 647. *See also Allen v. State Board of Elections, supra.*

States District Court for the District of Columbia. *Canady v. Lumberton City Board of Education, supra.*

This Court has already provided some guidance to the district courts as to the appropriate remedy once preclearance is denied. Anticipating the possibility of an objection on the merits once changes were submitted, this Court, in *Perkins v. Matthews*, 400 U.S. at 397 and again in *NAACP v. Hampton*, 470 U.S. at 182-83, instructed that the district court should invalidate any elections held using the unprecleared changes. Therefore, at a minimum, the results of the elections held for the unprecleared judgeships here must be set aside. However, further relief is required.[8]

It has long been a matter of black letter law that voting practices covered by Section 5 are not "effective as laws until and unless they are precleared . . . " *Connor v. Waller*, 421 U.S. 656 (1975); *McCain v. Lybrand, supra.* That proposition has been reiterated in many ways over the years. Failure to obtain preclearance "renders the change unenforceable," *Hathorn v. Lovorn*, 456 U.S. 255 (1982); unprecleared voting changes are null and void and may not be enforced. *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969); *Perkins v. Matthews*, 400 U.S. at 397. If the oft-repeated language of Section 5 caselaw is to continue to have any viability whatsoever, then the appropriate

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[8] Even the district court understood that at some point, the judges must be removed from office. J.S.App. 55a. Its error was not in the form of the remedy, but in permitting them to remain in the unprecleared seats *after* an objection had been entered by the Attorney General, while Louisiana sought judicial preclearance.

remedy, after an objection on the merits by the Attorney General must in fact be to declare the unprecleared changes null and void. In the instant case, that means that the unprecleared judicial positions must be dismantled, and the incumbents removed from their illegal seats.

Once the offices have been declared vacant, this Court should remand the case to the three-judge court, which has the power to fashion appropriate interim relief. *Hathorn v. Lovorn*, 456 U.S. 255, 270 (1982). Such relief could include a court-ordered interim election plan, tailored to remedy the Attorney General's objections to the method of electing the new judgeships, which would allow the judgeships to be filled until Louisiana obtains preclearance of another election plan.[9] Similar remedies have been deemed appropriate in reapportionment cases, for example, where election plans are invalidated under Section 5 and the state is unwilling or unable to adopt a plan which can receive Section 5 preclearance. *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *Connor v. Waller*, 421 U.S. 656 (1975). What is clear, however, is that the district court may not permit the judges elected pursuant to the objected-to statutes to continue in office.

Amici are fully aware that declaring the positions vacant will result in a period of disruption and possibly

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[9] Louisiana could, of course, pursue its declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance of the statutes to which the Attorney General has objected. Or the state legislature could pass new legislation, changing the method of electing the judicial positions that are the subject of the objection, and submit these new statutes for preclearance.

hardship for the State of Louisiana and its judiciary. That is, however, the remedy intended by Congress, *South Carolina v. Katzenbach, supra*, and routinely implemented by the courts in cases involving legislative bodies and city or county councils. *See, e.g., Holt v. City of Richmond*, 406 U.S. 903 (1972); *Canady v. Lumberton City Board of Education, supra; Busbee v. Smith*, 549 F.Supp. 494, 497, n.1 (D.D.C. 1982) (three judge). The appropriate context in which to consider any possible disruption or confusion is on remand, *after* the objected-to judgeships have been dismantled and the incumbents removed from office, *not* in imposing the initial remedy.

While such a result may seem at first blush to be harsh and unnecessary, it is important to remember that the statutes in this case do not involve merely the method of electing judges; they created the judgeships themselves. Thus, this is not a case in which, for example, the method of electing a pre-existing city council was changed from districts to at-large, or where staggered terms of office were implemented without Section 5 preclearance, and where the appropriate relief would involve an injunction against future use of the unprecleared practice and perhaps retroactive relief in the form of new elections. Here, the voting changes that have been denied preclearance are statutes creating the elected positions. Settled rules of Section 5 construction dictate that the objected-to statutes are unenforceable.

There is no justification for any modification of or delay in imposing that remedy. The Voting Rights Act was first enacted in 1965, and has been law for over 25 years. The pivotal case resolving the Act's constitutionality, and establishing the proper method of statutory

interpretation, was decided in 1969. *Allen v. State Board of Elections*, 393 U.S. 544. The questions concerning the scope of Section 5 and the procedures for obtaining preclearance, which created confusion in the early years, have been long since resolved. There is no excuse for further delay by the courts in carrying out the express intent of Congress: to require *pre*-clearance of changes in election procedures.

Further, whatever consequences occur are the direct result of the state's longstanding defiance of both the preclearance requirements and the findings of the Attorney General. Louisiana knew that the addition of judges and changes in district boundaries were covered changes, yet it implemented the changes without seeking preclearance. Indeed, the changes – some of which were implemented as long ago as 1968 – were not submitted for Section 5 preclearance until July of 1987, after litigation was filed under Sections 2 and 5 of the Voting Rights Act. The state refused to provide supplemental information requested by the Attorney General on four separate occasions, forcing him to rely upon the evidence and findings of the Section 2 court to complete the preclearance review (J.S.App. 109a-110a). By letters dated September 23, 1988 and May 12, 1989, the Attorney General denied preclearance. Undaunted, Louisiana requested reconsideration, and the Attorney General refused to withdraw his objection. Nevertheless, the state has persisted in its enforcement of the "objected to" judgeships and "notwithstanding the interposition of far-reaching §5 objections in 1988 and 1989 . . . has failed to adopt a racially fair election system for its trial and appellate judges even though the [district] court has

given the state ample opportunity to do so." Attorney General's Letter of September 17, 1990 Denying Reconsideration, J.S.App. 153a. Having deliberately put itself on a collision course with Congressional authority, Louisiana has only itself to blame for any resulting problems.

In the final analysis, the only way to prevent future disruption is for this Court to clearly reiterate that the Voting Rights Act requires *pre*clearance, and that the remedy for illegal implementation is immediate return to the *status quo ante*. Lower courts – particularly in judicial election cases[10] – have begun to consider the "equities" of the illegal implementation, and the "status quo" has been accorded weight despite its legal nullity. As things now stand, the further the state has gone in its illegal implementation before it is "caught," the lighter the penalty and less relief afforded minority plaintiffs. If a lawsuit is brought before the change goes into effect, it is enjoined. *See Allen v. State Board of Elections*, 393 U.S. 544 (1969). But

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[10] Federal judges have been much more sensitive to issues of disruption, and more reluctant to impose well-established remedies, in voting rights cases involving judicial elections. *See, e.g., Brooks v. Georgia State Board of Elections, supra; Hunter v. City of Monroe, LA*, Civil Action 90-2031 (W.D.La. Nov. 7, 1990) (Section 5 does not apply to elections for state court judgeships that are created and added to pre-existing judicial districts). See also *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc). There is no justification in either the language or legislative history of the Voting Rights Act for a "judicial elections" exception. Such a gloss, if permitted to stand, will seriously undermine the integrity of the Act.

if the state succeeds in implementing the change, it will likely stand while preclearance is sought. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971). And, under the holding of the three-judge court here, if the state ignores an objection by the Attorney General and declares its intention to continue to contest preclearance through the courts, it will be allowed to continue to enforce those changes despite the substantive objection. *See also Brooks v. Georgia State Board of Elections, supra.*[11]

For this Court to condone the remedial order of the district court would remove any incentive for a jurisdiction to preclear covered changes. To consider the disruption to the Louisiana judiciary that might result from an order removing the judges from the unprecleared positions and dismantling the unprecleared offices would be counter-productive in both the long and the short run.

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[11] The district court in *Brooks* first issued an order requiring the state to dismantle the judgeships at the end of the incumbent's term, unless Georgia obtained preclearance of the positions. However, after preclearance was denied by the Attorney General, the court entered an order virtually identical to that entered here, allowing incumbents to remain in unprecleared offices until and unless preclearance was finally denied by the District Court for the District of Columbia.

The result of that modification was to totally remove any incentive from the State to adopt a racially fair system of election which would cure the Attorney General's objection, although that was under serious consideration by Georgia before the modification. Instead, improperly elected judges will likely continue to sit in objected-to positions for several more years. Although the lawsuit was filed in July 1988 and the first injunction was entered on December 1, 1989, preclearance litigation in D.C. has barely begun at the time of this writing.

The only way to avoid future disruption to a State's judiciary – or legislature or Congressional apportionment plan – is to reaffirm that preclearance means *pre*clearance.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision of the three-judge district court for the Middle District of Louisiana; enter an order declaring the objected-to changes null and void; and remand for consideration of appropriate interim relief.

Respectfully submitted,

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